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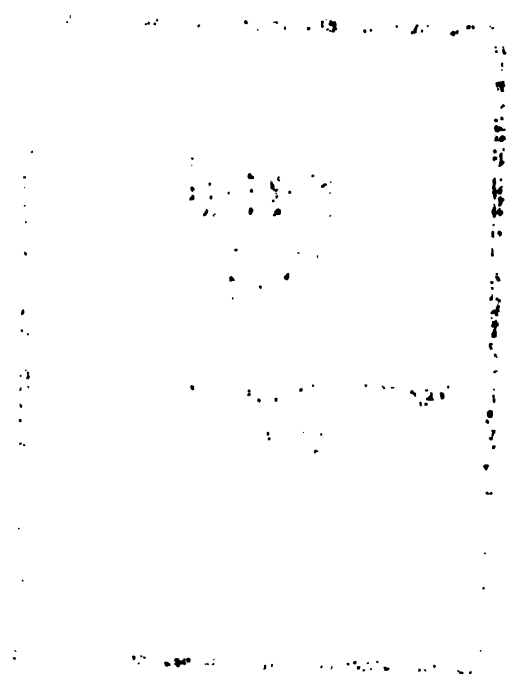
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REPORTS OF CASES

ARGUED AND ADJUDGED IN

THE SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,

FROM FEBRUARY 8, 1892, TO APRIL 1, 1893.

REPORTED BY

CHARLES COWLES TUCKER

AND

WALTER C. CLEPHANE.

VOLUME XXI.

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NOTE.

This volume completes the series of reports of cases adjudged in the Supreme Court of the District of Columbia. After the compilation of twelve volumes of the reports, I found that my professional engagements were such as to prevent my continuing the work ; and at my suggestion it was entrusted to Mr. CHARLES COWLES TUCKER and Mr. WALTER C. CLEPHANE, who have prepared, and to whom the bar is indebted for this volume. This explanation is made at the request of the publisher.

FRANKLIN H. MACKEY.

WASHINGTON D. C., March 22, 1895.

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OF THE
Supreme Court of the District of Columbia
DURING THE TIME OF THESE REPORTS.

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² Resigned October 2, 1892.

³ Installed November 22, 1892.

⁴ Installed February 11, 1893.

⁵ Appointed Associate Justice, see ⁴.

⁶ Installed February 11, 1893.

⁷ Resigned.

⁸ Installed January 15, 1894.

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REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

JABEZ B. WATKINS

vs.

PENNSYLVANIA RAILROAD COMPANY.

RAILROAD TICKET; ASSAULT; CONNECTING LINES; RIGHTS OF
PASSENGERS.

1. Where a railroad ticket is purchased, which on its face is good for a continuous passage over connecting roads from one point to another, if from any cause not the fault of the passenger or the result of his carelessness or wrong, the company is prevented from making a connection according to the letter of its contract, in carrying the passenger to his destination, and he is left over, he has a right to go upon the first train of the company to his point of destination, and is in no sense a trespasser in attempting properly to exercise that right.
2. When a railroad company sells a ticket for passage over connecting roads, from one point to another, the trains operated upon the connecting lines are regarded for this purpose as the trains of the contracting company, and each of the connecting companies and their employees are to be treated as the agents and employees of the contracting company.
3. If the holder of such a ticket in attempting, properly and lawfully to exercise his legal right to go upon the train of one of the connecting companies, is interrupted by the gate-keeper, and assaulted by him, the contracting company is liable in an action for damages resulting from that assault. .

At Law. No. 27,530. Decided February 8, 1892.

The CHIEF JUSTICE and Justices COX and JAMES sitting.

Hearing on a motion by the defendant for a new trial on a bill of exceptions. *Affirmed.*

The facts are stated in the opinion.

Mr. ENOCH TOTTEN for the defendant (appellant).

Mr. J. J. WATERS for the plaintiff (appellee).

The CHIEF JUSTICE delivered the opinion of the Court :

It appears that the plaintiff in this action bought a ticket of the defendant at the Union depot in the city of Pittsburgh for the city of Washington. It was a limited ticket, good for one continuous first-class passage from Pittsburgh to Washington, and by the short line only, subject to the conditions, that "in consideration of the reduced rate at which it is sold, the holder agrees with the respective companies over whose roads such holder is carried, to use this ticket for a continuous passage only on the Pennsylvania Railroad train designated by the punch in the margin leaving the station stamped hereon on the date punched out of the margin hereof, and failing to comply with this agreement either of the companies over whose roads this ticket is issued, may refuse to accept the same and demand the full regular fare, which the holder agrees to pay.

"The ticket is not transferable and it is void unless officially stamped and dated.

(Signed)

J. R. WOOD,
Gen'l Passenger Agt."

(Indorsed) "Union Ticket Office, June 30, 1886. Depot, Pittsburgh, Pa."

In the margin "Fast Line" is punched.

It appears from the testimony of the plaintiff, whose evidence in this respect is not contradicted, that after he had purchased the ticket, and as he was about putting his change in his pocket, an employee of the road, in the uniform of the Pennsylvania Company, came to him and asked if he was going east; he replied he was, and he was informed that the regular train had left but that they had prepared a special train to carry the passengers who were left and that they were ready to start and were waiting for him. There-

upon he was conducted through the gate and put upon the special train for Harrisburg, the assurance being that this special train would overtake the regular train at least at Harrisburg if not before that time. He says when they reached Harrisburg, the regular train had left for Baltimore; that he remained for some three or four hours in Harrisburg waiting for the next train for Baltimore, and was then taken by an officer or an employee of the Pennsylvania Company with others to the conductor of the train for Baltimore, who was informed by this employee that these were passengers who came on the special train and belonged to the regular train which had gone through, and the tickets were accepted by the conductor for their passage to Baltimore. Upon arriving at Baltimore they failed to make connection and he was told that he would have to wait some two or three hours before he could get a train for Washington. He waited until about that time when he was notified that the train was ready to go to Washington, and exhibiting his ticket, he started to go through the gate to the train that he was informed was going to Washington, when he was informed by the gate-keeper that the ticket was not good and that he could not go through. On account of the pressure of passengers going through the gate he stepped back for the time being until the passengers who were going on the train had passed through, and thereupon renewed his conversation with the gate-keeper, and informed the gate-keeper of the circumstances attending his obtaining the ticket. The gate-keeper informed him under what circumstances the ticket would be good; that it should be endorsed by the ticket receiver at Baltimore, but that this officer did not stay at that depot but was at the Calvert Station, one mile and a half away. The train was then about to depart. The gate-keeper testified that it would have taken ordinarily fifteen minutes to telegraph to the ticket receiver at the Calvert Station and get the authority to use this ticket. The plaintiff, after having more conversation, and the gate-keeper still denying him

the right to pass through, said: "I have a right to go on that train with this ticket and I propose to go." Thereupon he started to go through, the gate then being open, without attempting, so far as the testimony shows, any violence upon the person of the gate-keeper. He testified that the gate-keeper put his hand violently upon his shoulder, pushed him back so as to unbalance him and immediately closed the gate and prevented his going through. The plaintiff, without attempting retaliation, thereupon went to the ticket office, bought a ticket to Washington and the gate-keeper then let him go through. When he went upon the train the conductor would not recognize the ticket that he had bought in Pittsburgh, which he first presented to him, but required him to present the ticket that he bought in Baltimore for Washington; that before he went to buy the ticket last named, some conversation ensued between the gate-keeper and the conductor, after which the conductor said to him that he would have to buy a ticket to Washington, and when he got to Washington he would take him to the ticket receiver in Washington, where the money that he had paid for his ticket in Baltimore for Washington would be refunded.

The action on the part of the plaintiff is, as set forth in the amended declaration, substantially an action for assault and battery against the Pennsylvania Railroad Company, because of the assault and battery received by the plaintiff from this gate-keeper. The gate-keeper denies that he made any assault upon the plaintiff, says that he did not touch his person, but only shut the gate to prevent him from going through. It is conceded that upon this hearing on appeal it will be presumed that the question as to whether assault was committed was settled by the jury rightly.

The question arose upon the trial whether as a matter of law the plaintiff had a right to go upon that train, and the court charged the jury as follows: "In this case, I advise you that this plaintiff had the right to go in there, and that while the gate-keeper had the right to arrest him and to

stop him, to see about things, he had no right to forcibly, by laying hands on his person, prevent him from going in. He had the right to shut the gate in his face, and for the purposes of this suit, if that is all he did, there can be no recovery; but he had no right to forcibly restrain him from going in by touching his person. If he did that, the defendant is liable." So that the court in its charge to the jury held, as a matter of law, that the plaintiff had a right to go upon this train from Baltimore to Washington upon the ticket which he had purchased in Pittsburgh, and that the gate-keeper had consequently no right to restrain him by the exercise of physical force upon the person of the plaintiff.

Now it is said by counsel for the defense that the gate-keeper had no discretion in the matter; that he had his orders from his superior officers not to allow any one to go through the gate to a train upon a ticket for a particular train after the latter had passed; that if by reason of any circumstances occurring, the party should really be entitled to go on the train, the ticket receiver would give the right by proper indorsement upon the ticket.

It does not seem to be denied, that if this ticket had been presented to the ticket receiver the plaintiff's right to have the indorsement upon the ticket to go upon that train to Washington would have been recognized. It is said that it was recognized for the fellow-passengers of the plaintiff who came with him from Pittsburgh; that some of them had passed to the Calvert depot instead of going to the Union depot, and had their tickets properly indorsed by the ticket receiver, but the plaintiff testifies that he had no information or suspicion that any such thing was necessary; that he had no idea whatever that his ticket which he had used thus far would not be recognized upon the first train passing from Baltimore to Washington.

Now, it is said further, upon the part of the defence, that the evidence shows that the railroad line from Harrisburg to Baltimore, the Northern Central Railway Company, is a different corporation from the Pennsylvania Road, and

that the road from Baltimore to Washington was also controlled by a different company. But the evidence also shows that the party contracted in Pittsburgh for a continuous passage from Pittsburgh to Washington. The Pennsylvania company made this contract with the passenger and for the purpose of his passage to Washington the line is to be treated all the way substantially as the line of the contracting company. We think that it is clearly the law, sustained by ample authority, that under such circumstances each of the companies and their employees are to be treated as the agents and employees of the contracting company. We think that the evidence in this case clearly shows that whatever may have been the power or control of the Pennsylvania Company over the Northern Central Company and the Baltimore and Potomac Company, whether it was such as would under ordinary circumstances make them liable for any default or miscarriage of either one of these companies or not, the Pennsylvania Company had such arrangements with them—which arrangements were well understood by the employees and agents of the two connecting companies—that contracts of this character for a continuous passage through from Pittsburgh to Washington were to be recognized and accepted, and were understood to be valid and obligatory by all the employees and officers of these connecting companies.

That being true, what were the legal rights of the plaintiff in Baltimore with reference to riding upon the train about to start from Baltimore for Washington, on the ticket that he had purchased in Pittsburgh? We think it is very well settled that where a ticket is purchased for a continuous passage over different roads from one point to another, if by reason of any accident, or from any cause whatever, not by the default of the plaintiff or his carelessness or wrong, a company is prevented from making connection and keeping to the letter of its contract in carrying a passenger to his destination, and he is left over, the law is that he has a right to go upon the first train of that company to his

point of destination, and we think that was the legal right of the plaintiff in this case and that the gate-keeper had no right whatever to stop him from going, and cannot be justified in committing an assault upon plaintiff under such circumstances. It is true that he may have been discharging his duty according to his instructions, but he should have been instructed that passengers for Washington, who had been left by the regular train at Pittsburgh, had taken a special train, and that in the event of the regular train leaving Baltimore without them they should be conveyed on the next train that went out.

We think the railroad company was seriously at fault. It was its business to have given the information to the officers at Baltimore and to this gate-keeper. If it was intended that the passengers upon that train from Harrisburg to Baltimore who were going to Washington should see a ticket receiver at Calvert Station in Baltimore, in order to get their tickets viséd, so they could go on to Washington, it should have been announced upon the train by the conductor, or they should have been otherwise duly notified.

That this is the custom on this route is clearly shown by the evidence of the gate-keeper, who testifies that it was the custom of the company or of the ticket receiver at Harrisburg, whenever a train was late at Harrisburg, so that passengers for Washington would need to have their tickets endorsed, to telegraph to Baltimore, so that the officers at Baltimore might be advised of that fact, and that when that was done, the gate-keeper always passed passengers with such tickets through.

He says on page 23 of the record, as to passing persons who were late on the main line:

"Q. What were your orders on that subject?—A. Not to pass any one through the gate on a ticket like this, unless it was a regular train, unless we got orders from the ticket receiver at Harrisburg, or from our ticket receiver at Baltimore. We are notified sometimes. Of course they are bound to be late, and if they are we are notified."

He testifies in another place that no provision had been made that he knew anything of in this case by the authorities at Harrisburg for notifying the officers in Baltimore that there were passengers upon that train who were late, and who ought to be forwarded to Washington upon the next outgoing train.

As already stated, we think this case is to be distinguished from all the cases that are cited here by counsel, and that our decision in this case will have no such effect as is anticipated by counsel—to practically break up the practice of having gates and gate-keepers in and about depots for the purpose of preventing passengers and others from going upon the tracks except when they are authorized to do so for the purpose of going upon trains. Such regulations are proper, and may be enforced; but the railroad company cannot make such a regulation as that and then, by their own laches, negligence and failure to properly instruct the gate-keeper from time to time, as they should do, of the rights of other people, permit that gate-keeper to assault and insult passengers who have a right to travel on its road, and who have a right to go upon its trains.

There are quite a number of authorities to the effect that where a passenger is upon a train and has a ticket that has upon its face expired, a limited ticket for instance, a ticket for a passage on a prior date, with nothing to show that it has been extended, the conductor is justified in refusing to accept the ticket, and that the passenger under such circumstances is not justified in resisting, and if he does resist on the invitation of the conductor to leave the train or pay his fare, he can recover nothing for any force that may be used to eject him from the train, provided no more force is used than is necessary for that purpose.

There are cases cited to us where a party asked the conductor for a stop-over check, and the conductor instead of giving him a stop-over check, gave him a check which had on it, "Good for this trip only," with the date of the day that the check was given to the passenger. The passenger then

stopped off for a few days and then went upon a train and attempted to use this check. The conductor refused to take the check, and the passenger refusing to go off the cars, or to pay fare, he was forcibly ejected by the conductor. The court held in that case that the conductor was justified in using necessary force to eject the passenger from the train.

A case is also cited where the conductor of a street car attempted to give a transfer ticket to a passenger for another line, but by accident gave a transfer to the wrong line. The passenger went upon a car of the line that he intended to travel upon, and on offering this ticket he had received as a transfer, it was refused by the conductor and he was ejected from the car; and he brought his action. The court held that the street car company was not liable, upon the ground that the passenger had no evidence whatever of any right to travel upon that line; that the ticket which he had indicated another line entirely. We may well understand why that should be. He had no evidence of ever having had any right upon that line by virtue of any ticket which he was able to exhibit to the conductor.

Now, the general principle is that a party who has a right to go to any place without being regarded as a trespasser, and who does go there properly and lawfully, cannot be interrupted, so long as he does not interfere with the rights of anybody else, but simply pursues his own legal right, and that any party who does interrupt him, treat him as a trespasser, and forcibly eject him as a trespasser, is liable in law for an action for assault and battery.

But the courts have said that as a matter of public policy—in the class of cases where, although a man may have the strict legal right, he has no such evidence of his right with him as will be sufficient to demonstrate it to the conductor upon a train, in consideration of the fact that the conductor upon the train must be presumed to be ignorant of the real facts in the case and has no present opportunity of ascertaining them and must act promptly—that under such cir-

cumstances, for the purpose of preserving the peace and good order, a passenger who finds himself so situated should yield to the circumstances, and seek his remedy against the company if there has been any violation or breach of contract on the part of the company with him, and not compel the conductor to eject him from the train.

But we think this case is to be distinguished from all the cases which are cited by counsel for the defendant. In the first place, he was, as we think, not in fault. That is to say, he had done nothing himself to forfeit his right, nor had he omitted to do anything which he could do, or which he was advised that he could do to perfect his right to go upon the train from Baltimore to Washington. He had purchased his ticket in Pittsburgh in good faith for a passage upon the train designated in the ticket; the railroad authorities at Pittsburgh had furnished him a train which they said was a compliance with the requirements of the ticket; and he was induced by them to take passage upon that with the assurance that he would make connection at Harrisburg, so that his passage would be continuous and without interruption to Washington; that he would simply change to the regular train at Harrisburg and when this failed, his right, as we have already asserted, in our judgment, being to take the next train, and that right being recognized from Harrisburg to Baltimore, at Baltimore, his right still remained to take the next train to Washington.

Upon the facts before recited, it is clear that the plaintiff was in no sense a trespasser in attempting to pass through the gate to the train. It is equally clear that all the facts and circumstances which made it proper and legal for the plaintiff to go from Baltimore on the ticket purchased at Pittsburgh were known to the defendant's agents at Harrisburg, and that it was the duty of the latter, sanctioned by their own usage and custom, to notify the proper officers at Baltimore, including the gate-keeper, of the rights of the plaintiff and others in like situation, which duty they neglected to perform.

This action being against the defendant to recover damages resulting from an assault of its employee upon the plaintiff, it would seem to be monstrous to excuse the defendant upon its claim that the gate-keeper was acting under proper general instructions, without any authoritative information from it of the special circumstances which gave the right to the plaintiff to go through the gate to the train, when its own neglect to properly inform the gate-keeper is the direct cause of the assault and injury. For this reason this case is to be distinguished from those cited by counsel for the defendant to which allusion has been made.

Judgment affirmed.

NOTE.—A motion for a rehearing was overruled, March 14, 1892.

MILTON M. WHEAT ET AL.

vs.

LOUISA MORRIS ET AL.

EJECTMENT; JOINDER OF TENANTS IN COMMON.

Two or more tenants in common may, in this District, join in an action of ejectment.

At Law. No. 28,996. Decided February 29, 1892.

The CHIEF JUSTICE and Justices COX and JAMES sitting.

Appeal by the plaintiffs from an order sustaining a demurrer to a declaration in ejectment. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. H. O. and R. CLAUGHTON for plaintiffs (appellants).

Mr. F. W. HACKETT for defendants (appellees).

Mr. Justice COX delivered the opinion of the Court :

We have had several cases discussed before us, which involve the question whether several parties who own an undivided interest in a lot of ground, can unite in an action of ejectment. In this case, the plaintiffs in setting up their title, in compliance with the rule, in their declaration claim an interest in fee simple, as tenants in common of the property described, being part of lot 2 in square 117, of which they were lawfully possessed when the defendants entered the same and unlawfully ejected the plaintiffs therefrom, &c. There was a demurrer filed in which it was said that the statement of law to be argued thereon was this: "The suit is brought jointly by plaintiffs, who declare that they claim an interest in fee simple as tenants in common. The plaintiffs should sue severally and not jointly, and defendants say this is a misjoinder of parties." The demurrer was sustained, and the plaintiffs appealed.

At common law, as we all know, tenants in common can join in certain classes of actions. They could join in all actions affecting their joint possession; they could join in all actions of trespass *quare clausum fregit*; and in all actions to recover mesne profits, as well as actions of assumpsit for use and occupation founded upon an occupation of their land, which they held in common and of which they were in possession. I do not see why they could not have joined.

In the old obsolete forms of action, the right to enter, or the right of ejectment in its original form, was one in which the parties sought to recover for a term of years of which they had been dispossessed. But as the action of ejectment came to be used in order to try the title to a freehold, the form of which was an action by a fictitious plaintiff counting upon the demise of the owner of the freehold, the question then began to be made, what would be the proper form of demise, that is to say, what would be a sufficient averment of demise to the fictitious plaintiff. Different courts began to make a distinction between joint tenancy and coparceners and tenants in common, and it was long held that

joint tenants and co-parceners might demise jointly, and tenants in common would have to execute several demises of their undivided shares, and therefore, in this form of action, the fictitious plaintiff must count upon a joint demise from co-parceners or joint tenants, and upon separate demises of several undivided parts where the real plaintiff or the owners of the freehold were tenants in common. There does not seem to have been any doubt that tenants in that form might unite in an action of ejectment. The rule is thus stated in Adams on Ejectment, at page 210:

“When one or more tenants in common are lessors of the plaintiff, a separate demise must be laid by each, or they must join in a lease to a third person and state the demise to plaintiff to have been made by their lessee. The first is the most usual mode of proceeding, and the declaration need not state the several demises to be of the several shares belonging to the several tenants respectively, but each demise may be alleged generally to be of the whole premises demised; for under a demise of the whole an undivided portion may be recovered.”

The law in that respect is held differently in Maryland; that is to say, that where an entirety is claimed, an undivided part cannot be recovered under a declaration asserting that claim. That is immaterial, however, to the present inquiry. In Maryland I find that ejectments had been sustained in which the lessors tenants in common were averred to have executed separate demises of their undivided interest.

In the case of *Carroll and others vs. Norwood heirs*, 5 H. and J., 155, seven separate demises were made by as many tenants in common, each demise being of an undivided interest, and it was held that there could be no question as to the right to maintain an ejectment.

In the case of *Magruder et al. vs. Peter et al.*, 4 G. and J., 323, where a testator gave certain powers to sell to his executors, and they undertook to make sale, the heirs at law instituted an ejectment suit, and in that case there was no question made about the right of the several parties to

appear in the action as lessors, each one as to his undivided interest. Now, the court says: "In ejectment separate demises from several lessors may be laid in the declaration; and the plaintiff at the trial may give in evidence the separate titles of the several lessors to separate parts of the premises in question and recover accordingly," citing *Adams on Ejectment* and several New York cases, and among them the case of *Jackson vs. Sidney*, 12 Johns., 185. In that case the court went further than is at all necessary for the present inquiry. The court in New York held that though parties may have owned several parts not in severalty they might unite to recover the whole. "The declaration," says the court, "contains separate demises from each lessor, and upon the trial it was offered upon the part of the plaintiff to show separate title in each lessor to a distinct part of the premises in question, and this was objected to and overruled by the judge, and the plaintiff compelled to elect to proceed upon one count only. Had the lessors been tenants in common of the premises, there could have been no doubt but that they could have a right to recover the whole if they could have shown a title to the same; and there could be no good reason against their showing a separate title in each to a distinct part. It cannot subject the defendant to any inconvenience, or operate as a surprise upon him," &c.

Now, in a number of text-books, it is true as a general proposition, as asserted, that tenants in common cannot join in ejectment; but when we come to examine the cases referred to they amount simply to this: that separate demises must be alleged of the separate undivided interests of the tenants in common. They cannot unite in ejectment; that seems to be one meaning of the rule, which in a vague way is asserted in some of the text-books that tenants in common cannot join in ejectment. We are satisfied that at common law, under the fictitious form of ejectment, they could unite. Now, the next question is, whether our statute has made any difference in this respect. Section 809 says:

"All fictions in the pleadings in the action of ejectment within the District are abolished; and all actions for the re-

covery of real estate shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed thereof."

It is not to be conceived that Congress meant to restrict parties in asserting their interest, but on the contrary the law would be interpreted in the other direction. If any change was made, it would undoubtedly be in the direction of extending the rights of parties. The object of this statute, however, seemed to be simply to strike out fictions in pleadings and leave the parties with the same right of action in their own names that they formerly had in their fictitious form. That seems to be the true interpretation of this statute. We have in our rules a provision that allows a count for mesne profits to be united in a claim for the property in an action in ejectment. In actions of ejectment tenants in common could always unite in an action for mesne profits. That seems to imply that they might unite in an action of ejectment.

We have no difficulty, therefore, in coming to the conclusion that under our statute, as well as at common law, an action may be maintained by two or more tenants in common in an action of ejectment.

In this case there is another objection made to the declaration as not setting out a cause of action, and the criticism upon it is this: that it does not claim the property, but simply the interest in it without defining that interest. The rule requires that in declarations in ejectment, the plaintiff shall state distinctly what he claims. Now, they say that they sue to recover part of lot 21, describing it by metes and bounds, "in which said part of lot the said plaintiffs claim an interest in fee simple, as tenants in common, and of which they were heretofore lawfully possessed, when the defendants entered the same and unlawfully ejected the plaintiffs therefrom, and unjustly detain the same from them."

They seek to recover part of the lot, and they set their claim out and claim the estate in fee simple, held by them as tenants in common, and it seems to us that it sufficiently states the claim.

JOSEPH M. BROWN

vs.

GRACE WYGANT, EXECUTRIX &C. ET AL.

SCIRE FACIAS; RIGHT OF BANKRUPT AFTER ASSIGNMENT TO REVIVE
JUDGMENT OBTAINED BEFORE ASSIGNMENT.

W, while the holder of a judgment against B, was adjudged a bankrupt; after W's death and before the settlement of the bankruptcy proceedings, his executrix, G, endeavored to revive said judgment by proceedings in *scire facias*; B filed a bill to restrain the enforcement of the judgment of *fiat*, on the ground of fraud in G, and that she had no title to the judgment after the assignment, making the assignee a party defendant. G demurred, and demurrer was overruled (6 Mack., 447). G answered, and refuted the charges of fraud, and assignee filed a cross-bill, averring that he was entitled to collect the judgment so revived, and praying that G should be held to be vested with a beneficial interest in the judgment as trustee for him and be required to assign same to him as assignee. *Held*, that the bill must be dismissed, and the assignee having by his cross-bill affirmed G's action, the relief prayed in the cross-bill must be granted.

Equity. No. 10,666. Decided April 4, 1892.

The CHIEF JUSTICE and Justices COX and JAMES sitting.

Appeal by the defendants from a decree granting an injunction and dismissing a cross-bill. *Reversed*.

The facts are fully stated in the opinion.

Messrs. C. H. ARMES and A. A. BIRNEY for defendants (appellants).

Mr. ROBERT CHRISTY for complainant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This is an appeal from the Equity Court. It is alleged in the original bill that on February 9, 1874, Thomas K. Raymond obtained a judgment against the complainant for five thousand dollars, and on May 14, 1874, assigned the same to Stephen T. Wygant; that on the twenty-third day

of February, 1878, Wygant was duly adjudged a bankrupt by the District Court of the United States for the southern district of New York; that Wygant thereafter duly surrendered his property, the said judgment being expressly mentioned in his schedule of assets; that thereafter Henry T. Godet, of the city of New York, was duly chosen assignee in bankruptcy and qualified as such, and that all the assets of the said Wygant passed by operation of law to the said assignee; that the estate of the said bankrupt has never been settled; that the said judgment was the principal asset passing as aforesaid and that claims largely in excess of the value of the assets were duly proven and allowed against the estate of said bankrupt. The complainant filed as an exhibit to his bill a duly authenticated transcript of such bankruptcy proceedings.

It is further alleged that the defendant was aware of the facts aforesaid, but for the purpose of harassing the complainant, and to put him to trouble and expense to the end that complainant might be induced to pay such judgment, or a part thereof, and relying upon the complainant's ignorance of such bankruptcy proceedings, on the twelfth day of January, 1886, applied by her petition in writing, to the justice holding a special term of this court for probate business, and by representing that such judgment was an asset belonging to the estate of said Stephen T. Wygant, who had died in the meantime, and that it was of little or no value, obtained letters testamentary upon giving a nominal bond; that defendant on the first day of February, 1886, caused a suggestion of the death of the said Stephen T. Wygant to be made in the said Circuit Court, and the issuance of a writ of *scire facias* by the clerk, and a return thereof by the marshal of *nihil*, all on the same day; defendant on the fourth day of said month of February caused an *alias* writ of *scire facias* to be issued to the marshal and returned with the like endorsement of *nihil*; that on the third day of March, 1886, the defendant obtained a *fiat* from the said Circuit Court; that during all this time the com-

plainant was a resident of the said District, but neither of said writs was served upon him, nor any actual notice received by him thereof, nor of the proceedings in probate jurisdiction, nor on the law side, until long after they had taken place; that as soon as he had received casual notice he applied by his motion in writing to have the *fiat* aforesaid set aside, etc., to the said Circuit Court, but said court denied the motion for lack of power to act from lapse of time, but preserved his right to proceed in equity, and he thereupon began this suit; that defendant in order to further carry out the design aforesaid, began her suit upon said judgment in the Supreme Court of the city of New York, on to wit, December 28, 1885. The complainant prays for process and injunctions, provisional and final, against the enforcement of said judgment by defendant; also that such letters testamentary be declared void and said *fiat* invalid, and for general relief.

The executrix demurred to the bill, the demurrer was sustained with leave to amend, and complainant amended by naming Henry T. Godet, assignee in bankruptcy of said Wygant, as a defendant, and by charging that on March 3, 1878, the register in bankruptcy, by due authority of law, made and executed and delivered to said Henry T. Godet an assignment in writing of all the estate, real and personal, of said Stephen T. Wygant, including what he owned or was entitled to on February 16, 1878, except such property as was exempt by law; that said Godet delivered said assignment to his attorneys, Ely and Smith of New York, and that said Smith yet retains said assignment and is one of the legal advisers of defendant, Grace Wygant. He attaches a correct copy of said assignment, marked exhibit "A." He also says that at the time said writs of *scire facias* issued to revive said judgment, complainant was a resident of the District of Columbia.

The amended bill was also demurred to and the cause certified upon that demurrer to the General Term. The demurrer was overruled by the General Term and the

opinion reported in 6th Mackey, 447. It was held substantially that under the averments of the bill, the acts of the defendant Wygant were fraudulent with respect to the rights of the complainant; that the complainant even if he paid the judgment would still be liable to the assignee in bankruptcy, and it would therefore be manifestly unjust to him to permit the defendant to enforce the judgment; that he apparently had a good defence to the proceedings in *scire facias*, being the same facts stated in the bill, which he might have shown in that proceeding had he received timely notice thereof.

The cause was remanded for further proceedings, whereupon the defendant Wygant filed her answer, in which she says that she has no knowledge, except from hearsay, of any proceedings in bankruptcy against her late husband, Stephen T. Wygant, but she believes there were such proceedings; that she had always believed and still believes and so avers that there has not been any such proceeding as to divest her or her testator's estate of the legal or equitable title to the judgment against Brown. She does not therefore admit any of the allegations concerning said bankruptcy proceedings, but demands proof thereof. She understood and yet believes the bankruptcy proceedings were finally disposed of, but how they were ended she has never known; she knows nothing of the alleged mention of said judgment upon any schedule in any bankruptcy proceedings, nor of the claims allowed or disallowed, and has no knowledge that any of said claimants are dissatisfied with said proceedings. She denies that Mr. Smith, of Ely and Smith, is or ever was her legal adviser.

She admits that she obtained letters testamentary, but says she did so for the purpose of keeping alive said judgment that was about to become barred by limitation, and not because it was of any material present value. She obtained said letters in perfect good faith, and in her position estimated the value of the judgment at more than she believed it could be sold for; that she never thought of the

bankruptcy proceedings in connection with said judgment, or supposed it was affected by them, and if those proceedings affect her title as executrix she is not and never was aware of it. She did not mention said bankruptcy proceedings to her counsel, nor did it occur to her to do so. She left the proceedings to revive entirely to her attorney, and had no knowledge of Brown's whereabouts. She has for years employed agents and tried to get service of process on complainant personally for the purpose of keeping alive and realizing on said judgment, but he evaded service until after twelve years from the date of judgment, when a writ was served upon him in New York.

She denies that there are no assets of said estate in the District of Columbia.

She avers that before the return of the writs of *scire facias* diligent search was made for complainant by the marshal and he could not be found, and that the service was sufficient under the law, and the proceedings were regular. She admits that complainant's motion to set aside the *fiat* was overruled, and avers that the certified transcript filed with the motion did not constitute a good defence to proceed. She admits she has endeavored to obtain a judgment in New York, based upon the judgment in this court, but denies that any of the proceedings are intended to harass complainant, but only to realize said judgment.

On September the eleventh, 1888, the death of Henry T. Godet was suggested. Issue was taken on the answer of Grace Wygant and proofs taken. July 16, 1890, petition of Henry Leeds to be made party as assignee in bankruptcy of Stephen T. Wygant, deceased, in place of Henry T. Godet, deceased, was filed, which was on October 7, 1890, granted with leave to answer. November 8, 1890, the answer of Henry Leeds to the bill as amended was filed. He admits the recovery of judgment on February 9, 1878, against Brown, bankruptcy of Wygant, appointment of Godet as assignee, and that all assets of Wygant passed to Godet by operation of law; that said estate had never been

settled, and that claims in excess of the value of the assets were proved. He also avers death of Godet, September 5, 1888, and his own appointment as assignee in Godet's place, and that as such assignee he is entitled to said judgment, and asserts that as against him the complainant has no equity. He does not know whether Grace Wygant was aware of the bankruptcy proceedings or not, nor has he any knowledge as to her purpose in taking out letters, but he is advised that the effect of all her proceedings was to revive the judgment and to establish a title thereto in said Grace Wygant, for which she is accountable only to him as assignee. He has no knowledge of any wrong, irregularity or mistake in the proceedings to revive said judgment, and avers them to have been legal and sufficient, and he is willing that the same should stand and be confirmed, expressly ratifying and confirming, so far as he had power, all that said executrix had done in the premises, he being advised that she holds said judgment as trustee in his behalf. On November 10, 1890, leave was granted Henry Leeds, assignee, to file a cross-bill, and in it he sets up the proceedings heretofore recited and all the doings of complainant and executrix as set out, and avers that as assignee in bankruptcy of Wygant, he is entitled to hold and collect said judgment against said Brown, so revived in favor of Grace Wygant as executrix, and that she should be required to assign the same to him so that his title should appear of record, and he prays that said judgment may be decreed to be an asset of said bankrupt's estate, and of full force and vigor as against said complainant, and that said executrix may be required to convey and assign said judgment and all her apparent rights therein to him as assignee, so that he may have full benefit thereof, and for other and further relief.

The only real ground of defence alleged by the complainant in the bill to the proceeding in *scire facias* which was instituted against him by Mrs. Wygant is, that she had no title and that by virtue of the bankruptcy of Stephen T.

Wygant the title to the judgment is in the assignee and that should this judgment be permitted to stand as revived by *scire facias*, and the executrix permitted to press it and compel the complainant to pay it, that he would be again liable to pay to the assignee of Stephen T. Wygant, deceased. He does not say that he has ever paid any part of the judgment, that any part of it has ever been released, or that there is any reason why this judgment should not be enforced, except the mere want of title on the part of Mrs. Wygant as executrix. Upon the suggestion and under the order of the court we have now before us in this equity proceeding all of the parties, and if it is within the power of the court to grant the prayer of the cross-bill filed by the defendant Leeds, there is no difficulty in the case. It may be well to say that a very different understanding of the facts in the case is derived from the testimony than that impressed upon us by reading the bill. We are relieved from supposing that Mrs. Wygant intended to commit a fraud at the time that she was appointed executrix and at the time that she directed the writ of *scire facias* to issue. It would seem that she did so in good faith, and we think that this is so notwithstanding the testimony of Brown, who testified that after the inauguration of this suit he went to New York and had an interview with Mrs. Wygant in which she admitted that she had known of the bankruptcy of her husband, but that she supposed that the bankruptcy proceedings had long been settled and disposed of and no longer had any force or validity, and that when she came to Washington for the purpose of procuring a revival of the judgment she did not have the bankruptcy proceedings in her mind at all. There is not any proof of the allegations in the bill, as they now stand, that Mrs. Wygant entertained a scheme, or concocted a scheme which she endeavored to execute, to perpetrate a fraud under the jurisdiction of this court wrongfully obtained, on the complainant, and in assuming to herself title to the judgment which she knew at the time she did not possess. We think the

reverse is shown by the evidence and the answer of Mrs. Wygant. It is left then to be determined whether or not it is possible, the title to the judgment having passed to and being in the assignee in bankruptcy, that the proceeding in *scire facias* can be sustained by the confirmation or request of the assignee himself. This judgment was originally recovered in the name of Raymond, by whom it was assigned to Stephen T. Wygant. It is revived in the name of Raymond for the use of Mrs. Wygant as executrix. Raymond is still the nominal legal plaintiff, and it is so far regular to revive the judgment in his name.

On this hearing our attention has been called to a class of cases in which the courts have held quite uniformly, that where an assignee in bankruptcy permits his assignor to manage and conduct a case pending at the time of the assignment, the assignee is bound by whatever the bankrupt may do in the premises, and that being so, the defendant in such action may not object to the proceeding on the ground of want of authority on the part of the bankrupt to conduct the same. We held in the recent case of Crumbaugh vs. Otterback, 20 D. C., 434, that *scire facias* to revive a dormant judgment was a proceeding in the original action, though in another case we recently held that in respect to pleading defences to the writ it should be regarded as though a separate action. The opinions in these cases, we think, show that the decision in the one is not inconsistent with the other and that both are well sustained by reason and authority.

This case so far as the proceeding instituted in the Circuit Court by the defendant to revive the judgment is concerned, falls within the rule laid down in Crumbaugh vs. Otterback, and we see no reason, the question of fraudulent intent having been eliminated and the assignee in bankruptcy having by his answer and cross-bill affirmed the proceeding, why a court of equity should not sustain the same for the benefit of the bankrupt estate. As the case is now presented to us the complainant is wholly without

equity in asking us to remove an obstacle to his pleading the statute of limitations in bar to a judgment confessedly just and which he does not claim has ever been paid. The complainant's bill must, therefore, be dismissed. This leaves the case to be disposed of upon the cross-bill of Leeds, assignee in bankruptcy, the answers thereto and the testimony. There is nothing upon the record of the proceeding in *scire facias* that would justify us in regarding the judgment of *fiat* as void. Nor are we satisfied by the evidence that the complainant was at the time of the issuing of the writs of *scire facias* a *bona fide* resident of the District of Columbia. It is clear that Mrs. Wygant as testatrix must be held to be invested with the beneficial interest in the judgment by the *fiat* of the Circuit Court as trustee for the assignee in bankruptcy, and that she should be ordered to assign this interest to him.

Decree accordingly.

JAMES WATERS ET AL.

vs.

WILLIAM PRESTON WILLIAMSON ET AL.

DEFEASANCE; INNOCENT PURCHASERS.

1. When an absolute deed and a defeasance relating to the same transaction are executed at the same time, they must be considered together, and when so considered in equity, as between the parties, the deed because of the defeasance, must be held to be a mortgage.
2. When a party holding by virtue of a deed absolute on its face, but which in equity will be considered as a mortgage, mortgages the same property to a third person for value, such person takes only the rights of his grantor, unless the facts are such as to cause him to be regarded as an innocent purchaser.

Equity. No. 12,292. Decided April 11, 1892.

The CHIEF JUSTICE and Justices COX and JAMES sitting.

Appeal by the defendant from a decree setting aside a deed, deed of trust, &c. *Reversed.*

The facts are stated in the opinion.

Mr. L. C. WILLIAMSON for defendants (appellants).

Messrs. COOK & SUTHERLAND and IRWIN B. LINTON for complainants (appellees).

The CHIEF JUSTICE delivered the opinion of the Court :

The bill charges that on the 30th day of March, 1889, James Waters, being the owner of lot 16, in section 3 of the Barry farm subdivision, except lot numbered 43 and the west half of lot numbered 45 of a subdivision of said original lot 16, with his wife executed a deed to the defendant Williamson, which on its face was in fee for the consideration of five hundred dollars; that it was procured from them by fraud; that both of them were ignorant and unable to read or write; that the grantor Waters was in prison charged with having received stolen goods; that he was desirous of obtaining bail and also of procuring a lawyer to defend him; that two hundred dollars of said sum was to be Williamson's fee and three hundred dollars was to be paid by him in procuring bail; that both Waters and his wife agreed to execute a deed of trust to secure said sum of five hundred dollars; that no money was paid by Williamson, and that in fact Williamson executed the paper filed as an exhibit to the bill of complaint which is as follows: "I hereby agree to reconvey to James Waters and his wife, the property conveyed to me by them in a deed, dated March 30th, 1889, upon the payment to me by them of five hundred dollars, said sum being my fee in the case of U. S. vs. Waters.

(Signed)

W. PRESTON WILLIAMSON."

But the complainants aver that this paper was not read to them; that Waters had previously conveyed two lots out of said lot 16, and was in ignorance of the fact that said lots were not excepted in the conveyance to Williamson; that Williamson failed to procure the bail; that Waters was convicted and sentenced to the Albany Penitentiary in

one of the cases in which Williamson was employed to defend him and that an appeal was taken to the General Term; that convictions in four cases were entered against the defendant in the Police Court from which appeals were taken to the Criminal Court and that Williamson so neglected the business that Waters was obliged to employ other counsel. That on the 9th of February, 1889, Waters and his wife filed a bill to set aside and declare null and void said conveyance of March 30th, 1889, which bill for want of a replication to the defendant's answer was dismissed on motion of Williamson on the 9th day of October, 1889. The bill further charges that Williamson, with the intent to defraud Waters, on the 9th day of September, 1889, made a promissory note for five hundred dollars, payable in ninety days, with interest at six per cent., payable to the order of the defendant William Mayse, and on the same day executed to William A. Kimmell, as trustee, a deed of trust on said original lot 16 in Barry's farm subdivision, and providing upon default in the payment of said note or any installment of interest thereon, the lot should be sold and a deed of trust made in fee simple to the purchaser and a commission of five per cent. allowed the trustee, and after such allowance, and also costs and charges, said money was next to be applied to the payment of said note or the balance thereof, whether due or not; and the remainder, if any, to be paid to the said Williamson, thus perpetuating and continuing the original fraud, design and purpose on Williamson's part to secure and retain said lots, the ground and improvements being worth about two thousand to twenty-five hundred dollars. The bill further charges that the defendant Kimmell, at the request of the defendant Mayse, on the 14th day of February, 1890, advertised the lot for sale, the note given by Williamson not having been paid; that Williamson claims that he had offered to reconvey the premises to Waters upon payment of the sum of five hundred and fifty dollars and tendered a conveyance to Waters accordingly, and the complainants further say that the only

amount which Williamson could to any extent claim or demand was the sum of two hundred dollars, which sum, although exorbitant and unjust, they are ready and willing to pay. The complainants pray for a cancellation of the deed of March 30th, 1889, and the deed of trust of September 9, 1890, and that Williamson be ordered to reconvey the premises to Waters, and that Mayse, Kimmell and Stickney be enjoined and prohibited from making a sale of the property under the advertisement of February 15th, 1890, and the lots of ground conveyed to Allen and Hendricks be declared free from the conveyance made to Williamson and the defendants Mayse and Kimmell, and that both the said instruments be declared null and void as respects the property conveyed to said Allen and Hendricks.

The answer of Williamson denies the fraud charged in the bill and avers that the real transaction is shown by exhibit number 1 of the complainants attached to the bill, namely, a conveyance by him to Waters on payment of five hundred dollars, which was the amount Waters agreed to pay Williamson for defending him in certain criminal prosecutions against Waters in the Police Court and in the Criminal Court, and that it was no part of the consideration that he was to procure bail for Waters; that subsequently to the execution of the deed, Waters executed a further agreement to pay five hundred dollars, and if Williamson succeeded in acquitting Waters of the several criminal charges against him, he was to receive the further sum of \$3,000. Williamson avers that he performed his duty by appearing for Waters in several cases in the Police Court, and in three cases in the Criminal Court, expending \$50 in securing assistant counsel, expenses, &c. He says that he did not neglect the business of Waters, but attended to it until superseded by other counsel employed by Waters. He admits the statements of the bill as to the making of the notes and trust, and the obtaining of the sum of \$550, except, he says, that it occurred on the 10th day of October, 1889, instead of the 10th day of September, as averred in the bill. He

says, that he made the loan only for the purpose of raising his fee and the expenses that he had incurred on behalf of Waters; avers that after executing the deed of trust he executed a deed in proper form conveying lot 10 back to Waters, subject to the trust of Kimmell, and tendered a deed to Waters, and also to William A. Cook, his counsel, which they both refused to accept. He denies that Mayse had any knowledge of the transaction between Waters and himself or knew of the legal proceedings between them previously to the execution of the deed of trust. He says that when he tendered a reconveyance to Waters, no money was demanded because none was then due to him, and that before he executed the deed of trust he demanded the payment of five hundred and fifty dollars.

Mayse answers and says: he had no knowledge of the matters between Waters and Williamson; that Williamson was accustomed to keep an account with him and had often five hundred dollars at his banking place subject to his check; that he knew Williamson was good for the amount of the trust, and hence, made no examination of the title or inquiry as to who was in possession of the premises at the time of the loan. Williamson in his answer suggests that Mrs. Waters and Alexander M. Allen and Mary Hendricks are improperly joined as complainants.

The first inquiry is, whether Waters and wife understood what the real character of the transaction was at the time of the conveyance by Waters to Williamson, and was the deed in accordance with the understanding of the parties? The principal testimony upon this point is that of the parties, Waters and his wife upon the one side, and Williamson upon the other, with the exception of the testimony of Dorian, who took the acknowledgment of the deed. He testifies that at the solicitation of Williamson, on the day the deed was executed, 30th of March, 1889, he took the deed and went with Williamson to Waters, who was then in prison, and read the deed to Waters. Waters complained that the deed was not what he had expected, or had been agreed; that

it was an absolute deed conveying the property to Williamson, and he had expected it to be a deed of trust to secure the payment of five hundred dollars, and that he was to have a reasonable time to pay the five hundred dollars to Williamson, and he did not want to sign it in that form, but Williamson explained it to him and said it would be all right, and he signed it. Then Dorian took the deed to Waters' wife and she made the same objection, that it was not in proper form; that it was an absolute conveyance instead of a deed of trust to secure the payment; and thereupon he suggested that it would be proper for Williamson to execute a paper to the effect that the deed was subject to be defeated on the payment of five hundred dollars, and on such payment the property would be reconveyed to Waters. Thereupon Williamson did write and execute the paper according to which, upon the payment of five hundred dollars, Williamson agreed to reconvey the property to Waters.

The complainants, Waters and his wife, testified, that the deed was not what they or either of them intended to make. Waters testified that it was not read to him, and Mrs. Waters testified that it was not read to her. Mrs. Waters denies that the paper executed by Williamson and delivered to her, was read to her at that time. She denies that there was a statement made between them as to the deed being absolute, or that it was for that reason that the paper was executed by Williamson, but says, that she understood that the character of the transaction was that Williamson was to have two hundred dollars out of five hundred dollars as his fee in the cases in which he was employed, and that three hundred dollars was for the purpose of enabling him to get bail for Waters so that he might be discharged from prison pending a trial of his cases. Waters testifies that he had the same understanding. Williamson denies that anything was said at the time about three hundred dollars being for the purpose of enabling him to obtain bail, and that two hundred dollars of the five hundred should be his fee, but he says the agreement was, that five hundred

dollars was the real fee which he was to have for his services which he agreed to perform for Waters at that time; and that the object in executing the deed was to secure the payment of \$500 to him. Dorian says that he heard nothing at that time either from Mrs. Waters or Mr. Waters about a portion of this sum being to enable Williamson to obtain bail, or that his fee was not to exceed two hundred dollars. He understood from the conversation between both of the parties and Williamson, that it was to secure the payment of a fee of five hundred dollars to Williamson. The evidence establishes by a preponderance, we think, that Waters and wife understood the transaction. The deed executed by Waters and wife and the agreement of Williamson having been executed at the same time and relating to the same transaction, must be considered together, and when so considered in equity as between the parties the deed must be held as a mortgage, and this construction is binding upon Mayse, unless under the circumstances of the case he is entitled to be regarded as an innocent purchaser. We think he is only entitled to take by the deed of trust whatever Williamson could convey to him, and maintain his proper relations in equity with Waters; that he may be regarded as taking the place of Williamson and succeeding to all the rights that Williamson possibly had under the deed from Waters. Mayse testified that he did not loan this money to Williamson on the security of the deed of trust, but upon Williamson's credit; that he knew Williamson, who always had in his bank, subject to check, at least \$550; that he was good for that sum of money, and for that reason he did not take any steps to have the title examined. He did not make any inquiries as to who was in possession of the premises, or take any other steps to ascertain anything about the security which would be afforded by the deed of trust to Kimmell. It appears in evidence that the house had been occupied by Mr. and Mrs. Waters previous to his imprisonment, and that his wife continued to live there and was in possession at the time that the deed of trust was given. We

think under such circumstances Mr. Mayse is not entitled to be regarded as an innocent purchaser, and that he, therefore, took nothing by the deed of trust except that which Williamson might properly give and maintain his proper equitable relations with Waters. Williamson exceeded his power and did that which he had no right to do as far as Waters was concerned, by executing a deed of trust to secure the payment of \$550, being \$50 more than his interest in the property by virtue of the deed from Waters. Mayse, therefore, acquired simply a right to enforce a lien upon the property to the extent of \$500.

The decree of the special term is reversed, the deed from Waters to Williamson held to be a mortgage to secure the payment of \$500 within a reasonable time; that Mayse by virtue of the deed of trust and sale and conveyance of the trustee to him be held to have acquired the rights of Williamson as construed by this court and nothing more. *Ordered*, that Waters pay to Mayse the sum of \$500 within ninety days, and upon such payment Mayse shall release and convey the premises to Waters; that the costs of this case shall be paid in equal proportions by Williamson and Waters. If default be made by Waters in making such payment, then a trustee be appointed by the court to make sale of the premises, excepting the two lots previously sold by Waters as averred in the bill, and that distribution of the proceeds of sale be made according to the rights of the respective parties as settled by this decree.

The cause is remanded to the special term for execution.

GEORGE A. BOHRER ET AL.

vs.

HENRY B. OTTERBACK ET AL.

WILL; OCCUPANCY; JUDGMENT; ADMINISTRATOR; LEGACY.

1. An occupation of land by one heir pending the settlement of his ancestor's estate, without any agreement to pay rent, and not to the exclusion or against the will or objection of his co-heirs, is a permissive occupancy, and he is not chargeable upon a settlement for such use and occupation.
2. Under a bill filed to obtain the construction of a will, a decree which amounts to a personal judgment against one of the defendants for use and occupation of a portion of the estate, is erroneous as beyond the jurisdiction of the court. Such a demand should be pursued at law.
3. An administrator is entitled to commissions upon any moneys which come properly into his hands, even though it afterwards appears that such moneys do not belong to the estate.
4. If a legatee permits his legacy to remain in the *corpus* of the estate for many years after it is payable, he is not entitled to interest thereon.

In Equity. No. 9,820. Decided May 28, 1892.

The CHIEF JUSTICE and Justices JAMES and BRADLEY sitting.

Hearing on appeal by complainants and defendants from a decree of Special Term. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. EDWARDS and BARNARD for complainants.

Messrs. ENOCH TOTTEN, R. ROSS PERRY, HENRY E. DAVIS, WESTEL WILLOUGHBY, F. W. JONES, NATHANIEL WILSON, EDMUND BURKE and LEMUEL FUGITT for defendants.

Mr. Justice BRADLEY delivered the opinion of the Court:

This cause comes here upon appeal from the decree of the Special Term of October 6th, 1891. That decree overruled exceptions to and ratified and confirmed the report of the auditor in all things.

The object of the bill is to obtain a construction of the will of Philip Otterback, deceased, and the settlement of his estate.*

The decree required the trustees appointed to make sale and report the same to the court, and referred the cause to the auditor to state the account of the trustees, and the distribution of the funds.

The auditor made his report in conformity with the decree,

* NOTE.—The will of Philip Otterback is as follows :

"I, Philip Otterback, of the City of Washington and District of Columbia, being of sound and disposing mind and memory and understanding, and capable in law of making a valid deed or contract, do hereby make, publish and declare this my last will and testament.

First. It is my will that my funeral expenses and all my just debts be punctually paid, including a suitable memorial to mark my grave.

Second. I give and bequeath to each of my nine children, to wit: Catharine, Henry B., Sarah Maria, Lewis, Mary Rosetta, Cordelia and Emma Jane, the sum of two thousand dollars, to be paid to them as soon after my death as circumstances will permit, deducting from the said bequests respectively, such sum and sums as may have been advanced by me to them and every of them respectively in my life-time, and as shall be charged to them respectively on my books at my death, so as to equalize the amount to each one; the portions which shall thus go to such of my daughters as at my death may be under the age of sixteen years, to be invested by my executors in some safe and productive stock, and the interest thereon to be accumulated by them until each of my said infant daughters shall attain the age of sixteen years, and then to be paid, with such accumulation, to my said daughters as they respectively attain that age; and in the meanwhile and while my said daughters are under the age of sixteen years respectively, they shall be supported, clothed, schooled and educated as their seniors have been out of my general estate hereinafter bequeathed to my wife, and I charge the said general estate with their said support, clothing and education.

Third. I give to my two grandsons, Philip H. Ward and William Rufus Ward, children of my daughter Sarah, left orphans by the death of their father, the late William H. Ward, the sum of two thousand dollars each, to be deducted, and taken out of the portion of my said daughter Sarah, in my estate after the death of my wife.

Fourth. I give to "The Washington City Orphan Asylum" the sum of two thousand dollars, and I give and direct my executors in such proportions as in their discretion they may deem best, to pay to several Sunday Schools connected respectively with the Baptist, the Episcopal and the Methodist churches now existing in the Eastern part of said city, the sum of two thousand dollars; and I also give and direct my executors to pay to the Female Union Benevolent Society, or by whatsoever name the association of ladies in the city of Washington for the relief of the poor of said city may be called, the sum of five hundred dollars; and to the association in said city known and called by the

and it was filed in the cause June 18, 1891. The exceptions of the several appellants were filed the same day.

By his report the auditor charged Henry B. Otterback, one of the distributees, with the sum of \$1,080, for the use and occupation of a portion of the real estate subsequent to the death of the life tenant, and this item is the subject of an exception by Mr. Otterback.

It appears by the evidence that this defendant made use

name of "The Young Men's Christian Association," the sum of five hundred dollars.

Fifth. If Mrs. Mary A. Stevenson shall outlive my wife, I give to her the sum of one thousand dollars.

Sixth. These sums, to wit: Two thousand dollars to the Orphan Asylum, two thousand dollars to the Sunday Schools, five hundred dollars to the Ladies' or Female Benevolent Association or Society, five hundred dollars to the Young Men's Christian Association, and one thousand dollars to Mrs. Stevenson, making in all six thousand dollars, I direct to be paid after my wife's death equally out of the portions of my two sons Henry and Philip in my estate.

Seventh. I give to my beloved wife Sarah all the rest, residue and remainder of my estate, real, personal and mixed during her natural life, so long as she remains a widow, and in the event of her marrying again, it is my will that she receive from my estate whatsoever she would have been entitled to if I had died intestate.

Eighth. Upon the death or marriage of my said wife, I direct that all of my said estate (subject nevertheless to the legacies and bequests hereinbefore contained, and excepting the part thereof hereinafter specifically devised), shall be sold by my surviving executor, and the proceeds thereof shall be equally divided among my said children and their descendants (the descendants to take their parents' part), subject to the several deductions respectively hereinbefore provided.

Ninth. I give, devise and bequeath to my friend Levi Burk, of Fairfax County, in the State of Virginia, his heirs and assigns, after the death or marriage of my wife whichever may happen first, all my estate in said Fairfax County, Virginia, called Bellvoir, more commonly known as the White House estate, with all its appurtenances, and fisheries, to be held by him and them upon the implicit trusts following, and for no other purpose, until the youngest child of all my said children shall have attained the age of twenty-one years; that is to say, the said trustee for the time being is hereby empowered to rent out the said estate and fisheries in such manner as he may deem best, or otherwise to manage the said estate to the best advantage; to receive the rents, issues, income and profits thereof; to cut down and remove the doated, and decayed wood, and none other, except such as shall be necessary for the use of said estate, and after reserving to himself a commission not to exceed six per cent. on the said rents, income, issues and profits, for his trouble and responsibility, he shall apply the residue in the first place in his discretion for the education of each and every of my grandchildren now born and which may be born, until they shall respectively attain, the girls, the age of sixteen years, and the boys, the age of

of some vacant ground belonging to the estate, by placing some frame buildings thereon, and occupying them as a livery stable, and for this use he is charged at the rate of \$20 per month. It does not appear that he received any rents from third persons for the use of this property, or that he occupied it under any agreement or understanding that he was to pay rent, or that his occupation was to the exclusion of any of his co-tenants, or against their will or objection, or that it was of a larger portion of the estate than he could equitably enjoy. We are of opinion that under the circumstances his possession was the possession of all of the others, that he is presumed to have occupied the land with their consent, that he is not accountable for, nor

twenty-one years; and if there shall any surplus remain, the same shall be invested in some safe stocks bearing interest, to accumulate during the said trust; and when the youngest child now, and which shall hereafter be born, of all my said children shall have reached, or if living, would have reached the age of twenty-one years, I direct that the said trustee and his assigns shall sell the said estate and fisheries with all the appurtenances at public vendue, and receive the proceeds, and divide the same together with the said stocks and the accumulations aforesaid among such of my children as may then be living, and the descendants of those who may have died (they taking a parent's part); and for the purpose of keeping the said trust in active existence, I hereby empower the said Levi Burk, by will or deed, to appoint and create new trustee and trustees to execute the same; and in default thereof, I desire the court having chancery jurisdiction in said county, on the application in writing of any of the parties interested therein, to appoint a trustee or trustees to execute the said trusts.

Finally. I hereby constitute and appoint my dear wife Sarah, and my friend Levi Burk, of Fairfax County, in the State of Virginia, executors of this, my last will and testament.

In testimony of all of which I have hereto set my hand and seal, this twentieth day of March, eighteen hundred and fifty-five, having first signed the four preceding pages hereof, and requested Joseph H. Bradley, Joseph H. Bradley, Jr. and C. Birnie to sign hereto as witnesses of this, my last will and testament.

(Signed)

PHILIP OTTERBACK.

We, Joseph H. Bradley, Joseph H. Bradley, Jr. and C. Birnie, hereby certify that Philip Otterback, the testator above named, signed the foregoing paper-writing in our presence, and declared the same to be his last will and testament, and at his request, we do, in his presence and in the presence of each other, hereto sign our names as witnesses thereof.

(Signed)

JOS. H. BRADLEY,
C. BIRNIE,
JOS. H. BRADLEY, Jr.

chargeable with, any sum for such use and occupation, and that this exception should have been sustained. This disposes also of the exceptions not insisted upon in this court, taken by Sarah Kraft, Maria Tavenner, the complainant and others, based upon the failure of the auditor to charge H. B. Otterback at the rate of \$30 instead of \$20 per month for this use and occupation.

Henry B. Otterback is allowed by the report of the auditor the sum of \$1,043.55, for commissions as administrator of the estate of his mother, Sarah Otterback. To this allowance he excepted as inadequate, and the defendants, Sarah Kraft, Maria Tavenner, Joseph J. Darlington, administrator, and Benjamin L. Otterback, and the complainant Catharine Bohrer, excepted, on the ground that Sarah Otterback had no estate, and that what apparently was in her name belonged to the estate of Philip Otterback, for handling which no commissions should be allowed.

It seems that upon the death of Mrs. Otterback, the mother, she had an apparent personal estate in her possession, which was really and actually made up of assets belonging to the estate of her deceased husband. She had reinvested some portions of the personalty in her own name, some of it was in the name of her agent, and some in her name as executrix. The Orphans' Court decided that administration upon her estate was necessary. Henry B. Otterback was appointed administrator, and required to give a heavy bond. It is apparently true that he did not handle much of the estate, and that others probably performed some of his duties, but he assumed a responsibility required by the court, and was thereby involved in some trouble and expense, and, certainly to the extent of moneys which came into his hands as the estate of Sarah Otterback, whether really rightfully belonging to the estate of Philip, or not, he is entitled to some commissions. We see no reason to doubt that in respect to that allowance the auditor came to a just and correct conclusion, and find that the decree of the special term properly overruled all of the exceptions taken to that item.

Thomas E. Young is charged by the report of the auditor with the sum of \$1,080, for the use and occupation of a portion of the real estate subsequent to the death of the life tenant, and to this he excepted. The decree of the special term is a personal judgment against him for that amount.

The remarks made with reference to a similar charge against Henry B. Otterback apply with equal force to this charge, if it is intended to hold him responsible for use and occupation in the right of his wife.

Pending the period intervening the death of the life tenant and the sale of the land under the direction of the will, Mrs. Thomas E. Young had an equal right with the other heirs at law to use and occupy that portion of the realty, and in her right, her husband is not accountable or chargeable to the others therefor, inasmuch as the evidence indicates that such occupation was permissive by and not exclusive of the others. If it is sought to charge him, and hold him accountable for use and occupation as a stranger to the estate, as the decree apparently does, although he was made a party to the bill for the purpose of charging him as a trustee for some moneys that passed through his hands (in which respect he was completely exonerated by the special term) and although he is probably a proper party, as husband of Emma J. Young, one of the distributees, it is plain that the court had not jurisdiction to render a personal judgment against him, and that the demand should have been pursued at law. The exception of Mr. Young should have been sustained. The counter exceptions claiming that he should have been charged a greater sum were properly overruled.

Exceptions by Emma J. Young, and counter exceptions by other distributees were taken to the item in the report allowing Mrs. Young her legacy of \$2,000 bequeathed her by the will, and interest thereon from the death of the life tenant, on the one hand, because it is claimed that interest should have been allowed from the expiration of one year from the probate of the will, and on the other, because it is

claimed that neither legacy nor interest should have been allowed.

It is well settled that pecuniary legacies ordinarily bear interest from the expiration of one year from the death of the testator. Exceptions to the rule need not be stated. Unless the circumstances attending Mrs. Young's right to this legacy and her conduct with reference to it indicate that it has been forborne, or that it would be inequitable in her to claim it, interest should be allowed as claimed in her exception.

By the terms of the will the duty was imposed upon the executors of investing the legacy until the daughter attained the age of 16 years, when it with its accumulations should be paid to her. The testator died on the 5th day of February, 1858, and the legatee, Emma J. Young, attained the age of 16 in the following month of December. She was then living with her mother, and was supported by her, and she so continued until her marriage in 1864. After her marriage she resided with her husband in the same house with her mother until the mother's death, which occurred, March 27, 1885. By the will, the entire estate, after the payment of certain legacies, was given to the widow for life, and its usufruct became hers absolutely. Mrs. Young's legacy became payable within the year following the death of the testator, but was not paid, and the auditor reports the fact to be, that, notwithstanding the direction of the will, it was not invested, or in any manner separated from the estate in the possession of the widow and executrix. It remained, and by the legatee was so permitted to remain with the *corpus* of the estate during the life of the life tenant. It does not appear that the legatee, at any time during the life of her mother, made any demand for the payment of the legacy. She must be charged with the knowledge that the life tenant was receiving the entire income from the estate as her own, and it must be deemed that the enjoyment of the amount of this legacy and its remaining in the *corpus* of the estate was with the permission of the legatee. Under

these circumstances, and inasmuch as practically seven-eighths of it would have to be paid by the other distributees, it appears to us that it would be inequitable to allow Mrs. Young interest for some 27 years prior to her mother's death.

For the counter exceptants it is claimed, that, inasmuch as the will required the executrix to invest the legacy and turn it with its increment over to the legatee at 16 years of age, the executrix must be held to be a trustee *quoad* the legacy, to have held it in that capacity, and that her personal liability, as trustee, was substituted for the responsibility of the estate, and the legatee must look alone to that. The fact is, however, that the legatee attained the prescribed age within the period usually allowed for ascertaining the condition of the estate, that it cannot be assumed that the executrix did invest this legacy immediately, and the auditor finds that in fact it was never separated from the bulk of the estate, and was never, therefore, separately invested. The legacy is in the bulk of the estate, and must be paid out of it. The auditor appears to have reached an equitable adjustment of the matter by his allowance of the legacy with interest from the death of the life tenant, and we find that the exceptions were properly overruled.

The other exceptions that remain to be considered relate to the failure of the auditor to charge against the distributive share of the complainant the due bill for \$700—given by her husband to the life tenant and executrix. In behalf of the complainant it is claimed that it was an indebtedness to the life tenant, and therefore the Special Term rightly refused to charge it against the distributive share of the complainant. On the other hand, the exceptants claim that it was an advance out of the estate to Geo. A. Bohrer as husband, on account of his wife, to be charged to her in the ultimate settlement of the estate.

The due bill in express terms states the amount as due Mrs. Otterback, as executrix, and makes it a charge against the future settlement. This we understand to mean, that

this amount was to be treated as an advance upon her account, and was to be charged against her share in the future distribution of the estate. The character of the dealings between the legatees and executrix supports this theory, and the circumstances of this item appear to sustain it. The scheme of the complainant's bill and of this whole proceeding requires that this advance, although represented by the individual note of George A. Bohrer, should be treated as an advance upon, to be credited to the distributive share of Mrs. Bohrer, and we so determine.

The decree shall be modified in accordance with this opinion.

JAMES L. BARBOUR ET AL., trading under the firm
name of the INDEPENDENT ICE COMPANY

v.s.

ALBERT G. JOHNSON.

EQUITY; LEASE.

Where one of two joint lessees of land with a privilege of purchase, purchases the land from the lessor, the purchase enures to the benefit of his co-lessee.

In Equity. No. 11,221. Decided May 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and BRADLEY sitting.

Appeal by defendant from decree of the Special Term.
Affirmed.

The facts are stated in the opinion.

Messrs. CARUSI and MILLER for defendant (appellant).

Mr. SAMUEL MADDOX for complainants (appellees).

Mr. Justice BRADLEY delivered the opinion of the Court :

The complainants, copartners under the name of the Independent Ice Company, by their bill of complaint, aver

that they were equally and jointly interested with the defendant in a lease by John Marbury to them, and in a privilege of purchase contained therein of lot No. 4, and the east half of lot No. 5, on the south side of Georgetown, D. C., and that in violation of their rights the defendant had procured a deed of the whole of the property to himself, to the exclusion of complainants, and refuses to convey to them; that upon the faith of the right of purchase the complainants had made expensive improvements, and had rebuilt a wharf upon the lots under an agreement that the defendant would pay one-half the amount expended for it; that they have offered, and are ready and willing to pay to the defendant one-half of the amount paid by him for the property, less such sum as on a proper accounting may be found to be due by the defendant on account of the extension and improvement of the wharf upon the premises, upon the delivery to them of a good and sufficient deed, conveying title to an undivided one-half interest in the property. They pray that the defendant may be decreed to convey to them by a good deed in fee simple an undivided one-half interest in the property, and they offer to pay to the defendant one-half of the purchase money, less such sum as may be due by defendant on account of the extension and repair of the wharf.

The defendant, by his answer, denies that complainants took or had any interest in said land under said lease, either as lessees or in any option or right of purchase; and he avers that the lease was made solely to him, and that it was improperly and without authority so interlined by the complainants after its execution as to make them parties to it, but it was never assented to by John Marbury, and the alteration was made without the knowledge or concurrence of the lessor. He denies that the complainants made expensive improvements upon the faith of the lease, but does not deny that the wharf was improved and extended, or that he agreed to pay one-half of the expense; he alleges that the complainants agreed to keep the wharf in repair, but failed

to do it; avers that Marbury declined to convey at first, when the alteration was called to his attention, but finally agreed to convey to him alone.

The facts as developed by the depositions appear to be that complainants, prior to the date of the lease, had purchased the ice plant of J. Harrison Johnson, upon lots two and three on Water street, Georgetown, and had leased the land from him with the privilege of purchase for the sum of \$10,000; and that at the same time, J. Harrison Johnson, who had a sort of verbal lease with Marbury of the land in controversy, put the complainants into possession of it. This lease was to expire June 30, 1885. The defendant was using the Marbury lots at the time of complainants' occupancy for the purpose of wharfing wood and coal. He continued to so use them.

When the complainants took possession they changed the front of the ice houses, and built a platform on the west side so as to use a part of lot No. 4, one of the lots in controversy, in loading their wagons, and this use of that lot became an important adjunct in the conduct of their business. About this time when the Marbury lease or license expired, the complainant, Church, for the firm, and the defendant, had some conversation with reference to procuring a lease of lot 4, and one-half of lot 5, with the privilege of purchase. Church says that he instructed the defendant to get a lease for three years to them jointly, with the privilege of purchasing for \$4,000. The defendant denies this and says that Church told him that he could get the lease on his own account. The defendant did get the lease and took it to Church executed for inspection, and he admits that thereupon Church remarked that the company were not mentioned, and he replied that it made no difference. He left the lease with Church who says that he altered it, so as to make complainants parties in the presence of the defendant, kept it to make a copy, telling him that he would have a copy made by his son, and that defendant could then take it to Mr. Marbury and have him confirm it.

Defendant admits that he left the lease with Church, and that he subsequently went to Church's son, obtained it and discovered that it was altered; he denies that it was altered in his presence, or that he was aware of the fact, until he subsequently obtained possession of it. He admits that he went before a notary public and acknowledged it in its altered condition, and that he caused it to be so recorded among the land records of the District of Columbia. He says that he took the lease to Church for inspection to see if it was in due form, as he was inexperienced in such matters. He also says that when he found that Church had altered it so as to make the company parties jointly with himself he did not protest or object or say anything because he knew that such an alteration was invalid. Soon after the lease was made the complainants and the defendant agreed as to how much of the leased premises they should respectively occupy, and they apportioned the rent accordingly, so that complainants paid one-fourth and the defendant three-fourths.

The complainants built a shed on the west side of the ice house projecting some thirteen feet over lot 4 for the protection of their wagons, and in January, 1888, a few months before the expiration of the term of the lease, they built a new wharf along the front of the several lots at a cost of over \$700. The defendant stood by and permitted this to be done, and made no declaration of any purpose to claim the exclusive right to the option of purchase. Two months before the lease expired he had a dispute with complainants' agents as to the occupancy of the land, and thereupon he procured the lease from the record office, took it to Marbury and showed it to him. Marbury said that the lease was void because altered, but that inasmuch as he had agreed to sell to defendant at \$4,000 he would do so; whereupon the defendant paid Marbury \$4,000, and received a deed of the land. The special term decreed a conveyance upon payment of \$2,000, less such amount as the auditor might find to be due by the defendant as his just share of the cost of the wharf.

It is claimed by the defendant that if the lease was altered by Church, with the consent of defendant, the bill should be dismissed, because they were joint wrong-doers against Marbury. We are, however, unable to see in what respect Marbury was injuriously affected by the alteration; he could have assented to it, and have had an additional responsible lessee, or he could have repudiated it. But he is entirely out of the question, and his rights cannot affect the equities if any, existing between the complainants and defendant.

It is also claimed by the defendant that Marbury repudiated the lease and made his sale to the defendant outside of, and without reference to it, and that therefore the complainants have no equity. The fact is, nevertheless, that Marbury sold to him for \$4,000, the agreed price, because he had agreed to sell to him at that price. If the defendant agreed with the complainants that they might have an equal and joint right with himself to purchase the land for \$4,000, it does not matter that he and Marbury agreed to consider the sale actually made, as made under or outside of the covenant contained in the lease. It is the purchase that we are dealing with, not what the defendant and Marbury may have been pleased to characterize it. Having assented to the alteration of the lease by his silence, having ratified it by his acknowledgment and record of it as altered, and having permitted the complainants to act upon the faith of an interest under the lease never repudiated by him until he obtained his deed, and having stood by and permitted complainants to make expensive alterations and improvements, he is estopped to say that the complainants took no interest under the lease, that their right was repudiated by Marbury, and that he bought not under, but outside of the terms of the lease.

It is claimed by the defendant, that granting that the complainants were led to believe by him that they were to be jointly interested in the property under the lease in question, the defendant did not assent to the alteration, and the agreement is within the statute of frauds. We find, however,

that the defendant did in fact assent to the alteration, and did practically re-execute the lease thereafter, and that if the statute of frauds could be relied upon as applicable to a case of this kind, there is a written instrument conferring a joint right to purchase the land described upon both complainants and defendant, for the consideration of \$4,000, signed by the defendant, the party to be charged, as well as by the complainants. It does no violence to the language used, and it is only reasonable to construe this to be an agreement by the defendant that the complainants shall have and enjoy the right to an equal share and interest in the land if purchased, upon the payment of one-half of the consideration.

The circumstances of this case are such, in our judgment, as to justify the conclusion that it is not within the statute. They require that the defendant shall be held to be a trustee for the benefit of the complainants, to the extent of one-half of the interest of the land purchased. To permit him to retain the exclusive benefit of the purchase would be contrary to equity and good conscience, and enable him to perpetrate a fraud.

"It is (says Chan. Kent in *Holridge vs. Gillespie*, 2 J. Ch., 30,) a general principle pervading the cases, that if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, or by some contrivance of fraud, he shall not retain the same for his own benefit, but hold it in trust."

The decree below is affirmed.

THOMAS D. SINGLETON.

vs.

JACOB FRANK.

ATTACHMENT; JURISDICTION.

This Court, under Sec. 769, R. S. D. C., has no jurisdiction of suits cognizable by Justices of the Peace, when the sum in controversy is less than \$50, and cannot take jurisdiction of a suit involving less than that sum, in order to allow the plaintiff to begin attachment proceedings against the defendant.

At Law. No. 30,986. Decided June 13, 1892.

The CHIEF JUSTICE and Justices JAMES and BRADLEY sitting.

Hearing on an appeal by the plaintiff from an order sustaining the defendant's motion to quash a writ of attachment. *Affirmed.*

Mr. PERCY METZGER for plaintiff (appellant).

Messrs. WHITAKER & PREVOST for defendant (appellee).

The plaintiff, Thomas D. Singleton, on October 11, 1890, filed a declaration on the common counts against the defendant, Jacob Frank, claiming the sum of \$47.50 alleged to be due upon an open account. With the filing of his declaration the plaintiff caused to be issued a writ of attachment against certain personal property alleged to belong to the defendant. The grounds of the attachment, as stated in the supporting affidavit, were the non-residence of the defendant, and "that the defendant had removed a portion of his effects, and was about to remove all of his property from the District in order to defraud his creditors."

The defendant, on February 16, 1891, filed a motion to dismiss the suit for want of jurisdiction. The motion was on March 5, 1891, sustained, and the suit dismissed. From the order of the special term dismissing the suit, the plain-

tiff appealed to the General Term, where, on June 13, 1892, the judgment of the court below was *affirmed*.*

ELLEN E. BARTLEY
vs.
HARVEY SPAULDING ET AL.

PARTY WALL.

One of the uses of a party wall being to afford a complete division between adjoining houses, the opening of windows in such a wall by one owner to the discomfort and inconvenience of the adjoining owner, is an injury which equity will redress by injunction; following *Corcoran vs. Nailor*, 6 Mackey, 580.

In Equity. No. 1171. Decided June 24, 1892.

The CHIEF JUSTICE and Justices JAMES and BRADLEY sitting.

Hearing on an appeal by the defendants from a decree of the special term granting an injunction. *Affirmed*.

The facts are sufficiently stated in the opinion.

Messrs. HARVEY SPAULDING and WESTEL WILLOUGHBY for defendants (appellants):

The injury complained of is not the injury to the wall itself, but that the privacy of complainant's room is destroyed, this being the *gravamen* of her complaint.

That such an injury is not actionable will appear from the following authorities: 7 Am. Dec., 46; 46 Am. Dec., 461, and note; 42 Am. Dec., 582, n.

Mr. E. A. NEWMAN, for complainant (appellee):

It was clearly a trespass for the defendants to cut the win-

* No opinion was filed in this case. A report of the case, made up from the pleadings and docket entries, is made, owing to the fact that the question decided is a new one, and has never before, to the knowledge of the reporters, been passed upon by an Appellate Court of this District.—REPORTERS.

dows, whether the wall was wholly upon the complainant's lot, or the same was a party wall, and trespass will be enjoined in all cases where, from the nature of the trespass, or the circumstances of the parties, the remedy at law cannot be full and adequate. 3 Wait's Actions and Defenses, 700, and authorities cited. *Livingston vs. Livingston*, 6 John. Ch., 497; *Amelung vs. Seekamp*, 9 Gill & J., 468; *Sullivan vs. Hearnden*, 11 Ga., 294; *Whitfield vs. Rogers*, 26 Miss., 84; *Corcoran vs. Nailor*, 6 Mack., 580; *Brooks vs. Diaz*, 35 Ala., 599; *Phillips vs. Boardman*, 4 Allen, 147; *Danenhower vs. Divine*, 51 Texas, 480; *High on Injunctions*, §§ 332, 792, 852.

In *Fowler vs. Saks*, 18 Dist. of Col., 570, the subject of party wall is discussed, and the court use this language:

"If tenants in common, each has the right to have his interest in common undisturbed; if they are tenants in severalty, each has the right to one-half of the wall in severalty, and to the support of the other half. On general principles it would seem neither one has the right to disturb the wall."

In *Corcoran vs. Nailor*, 6 Mack., p. 580 (a case in many respects similar to this), the court dealt elaborately with the question of the rights of adjoining proprietors in party walls, and clearly decided that no windows or other openings are to be made therein; that equity has jurisdiction, and a mandatory writ of injunction is the proper remedy. Many authorities are cited in the case in support of this opinion.

Mr. Justice JAMES delivered the opinion of the Court:

This was a suit for an injunction requiring the defendant Spaulding to close certain windows in what is alleged to be a party wall, overlooking the premises of the complainant and interfering directly with her enjoyment and with the privacy of certain rooms in her house. It appears that the complainant and the defendant are owners of two adjoining properties, originally belonging to Alexander R. Shepherd in his subdivision of square 164. The houses were sold at different periods by Shepherd as lots 12 and 13. The de-

defendant claims some peculiar right, on the ground that Shepherd's conveyance of his title was prior to that of the complainant and that in that way it became necessary, in order to save any rights to the party wall so-called to the complainant, that there should have been a reservation out of the deed to Spaulding. His claim is that he bought the whole division wall as an appurtenance.

Where a wall is built in a row of houses the whole of it is not an appurtenance to one of them. The purchaser of each house acquires half of the division wall as a party wall. One of the houses runs back further than the other, but stands partly on each lot. The defendant was limited, therefore, to his right in a party wall.

We have already considered this question in the case of Patrick Corcoran *vs.* Washington Nailor, in 6 Mackey, 580, and the court has no reason to doubt at all the law as there laid down. We there said: "The servitude imposed *in invitum* is to be construed with the utmost strictness. It renders the occupation of another's land lawful only when the wall with which it is occupied satisfies the reason and purpose for which the easement was imposed. The servient owner is compelled to submit to the burden only on the ground that the thing imposed is, in contemplation of law, a benefit equally to him and to the dominant owner; in other words, that it at once stands ready for his enjoyment for all the purposes which a party wall is intended to serve. These purposes include several uses. It is intended, in the first place, to serve for the support, at any point, of the beams which the servient owner may reasonably have occasion to insert in a supporting wall. This forbids the construction of openings where beams cannot be inserted, and support cannot be afforded. In the next place, it is intended to serve the purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide. It is no answer to say that the dominant owner stands ready to fill up the opening whenever the servient owner desires to use the wall as a party

wall. That very statement admits that it had not been meantime a party wall, and the servitude only renders lawful occupation by an actual party wall. The occupation meantime by what is not a party wall is not the enjoyment of an easement, but is simply a trespass.

"If a wall with windows or openings is not a party wall within the intention of the rule, it imposes the servitude of such a wall and is therefore a trespass. We have to consider next that a trespass is accompanied in this case with constant circumstances, which caused discomfort and inconvenience to the injured party in the enjoyment of the rest of his land. Windows overlooking his domestic ground diminish the proper enjoyment of the premises and impair their value."

The court then went on to say: "That not only must an opening be closed, but that it must be done in a particular manner, that is to say, the brick-work used in closing the opening should not be a mere patch, but should connect with the adjoining wall in the usual manner of a continuous wall." That is to say, it is not to be patch-work, or a square patch of bricks filled in, because that does not give the support to the wall that it should have as a party wall.

We affirm the injunction granted below with this modification, that these window frames are to be removed, and the space is to be built up just as the rest of the wall was built. Not a square patch of work put in, but the bricks are to interlock and the wall is to be made as solid as a party wall should have been made.

With that addition the decree of the Equity Court is affirmed.

WILLIAM WHELAN ET AL.
vs.
 CATHERINE V. YOUNG ET AL.

CONTRACTS; MECHANICS' LIENS; SUB-CONTRACTORS.

1. A sub-contractor who postpones filing his notice of lien until the principal part of the contract price has been paid by the owner to the contractor, can assert a lien on the property only to the extent of what remains due under the contract. In such a case the lien has no retroactive effect, but operates only from the date of filing.
2. The rights of a sub-contractor are statutory and do not grow out of any privity of contract with the owner.
3. It is the duty of sub-contractors in the exercise of the privileges granted them by the mechanics' lien law, to use such diligence as to avert loss to every one interested.

In Equity. No. 11,667. Decided June 27, 1892.

The CHIEF JUSTICE and Justices HAGNER, COX and JAMES sitting.

Appeal by the defendants from a decree of the Special Term upon a bill filed to enforce mechanics' lien. *Reversed.*

The facts are stated in the opinion.

Messrs. WILLIAM F. MATTINGLY, EDWARDS & BARNARD, and LEON TOBRINER for defendants (appellants).

Messrs. SAMUEL MADDOX and A. B. DUVAL for complainants (appellees).

Mr. Justice Cox delivered the opinion of the Court:

On the 9th of June, 1888, Hanson C. Walter entered into a written contract with Mrs. Young, the defendant, to build a house for her and complete it by December 1, following, for the sum of \$6,063.91, to be paid in eight installments as the work progressed, and the contractor was to forfeit \$5 for every day's delay in completing the house beyond the time agreed on.

Mrs. Young paid six of the installments, amounting to

\$4,900, when, on the 17th of December, sixteen days after the house was to have been completed, Walter abandoned the work, leaving the house unfinished and \$1,163.91 of the contract price yet unpaid. It is admitted, by stipulation, that Mrs. Young, after Walter's abandonment of the contract, paid \$544.60 in order to complete the house according to contract.

This would leave \$620.31 of the contract price unexpended. It is further admitted, that without negligence on her part she was unable to have the house completed until May 23, 1889.

If she be allowed to charge the \$5 per day as liquidated damages for the delay, the balance of the price would be more than absorbed.

In the meantime, on the 17th of December, 1888, the day Walter abandoned his contract, the complainant Wm. Whelan filed his notice of lien for the sum of \$492. He was followed by others, the claims of all amounting to \$2,315.53.

This bill was filed on the 9th of March, 1889, for all the alleged lienors to enforce the liens by a sale. It was dismissed as to Whelan and one other, Chappellear, whose claim was for \$51.05, and who has died, but a decree rendered in favor of the rest for claims amounting to \$1,772.53, and an appeal taken by both sides.

As far as we can gather from the printed record, Whelan's claim must have been dismissed, because the proof showed that he had been working for Walter on various houses; had mixed his accounts all up together and received payments from him during the building of Mrs. Young's house, which probably ought to have been credited to that work, but were not.

There is one question, however, common to all the claims. The broad question is, whether a sub-contractor who postpones filing his notice of lien until the principal part of the contract price has been paid, according to the terms of the contract, can, by filing his notice, assert a lien on the owner's property for his entire claim, although it may exceed in

amount what remains due under the contract. This will depend upon the time from which the lien is to attach and operate.

If we seek the meaning of the existing law by the usual test, *i. e.* by considering the old law, the mischief and the remedy, what do we find?

By the old law, as embodied in section 709, R. S. D. C., the sub-contractor's remedy was to give notice of his claim to the owner and that he held said owner responsible, and he thereby acquired simply a formal claim against the owner, not to exceed, however, the amount due from him to his contractor at the time of the notice. What mischief, under this law, Congress intended to remedy one can only conjecture. In argument, it was claimed that the mischief was the possible combination between the owner and the builder to prevent the sub-contractor from receiving anything by so manipulating accounts that nothing would appear to be due when the sub-contractor's notice should be given.

Assuming this to have been the mischief contemplated, the present case will illustrate the manner in which it is remedied by the act of July 2, 1884, which is the law now in force. That act declares (section 1), that "every building hereafter erected or repaired by the owner or his agent in the District of Columbia, and the lot or lots of ground of the owner upon which the same is being erected or repaired, shall be subject to a lien in favor of the contractor, sub-contractor, material-man, journeyman and laborer, respectively, for the payment for work and materials contracted for or furnished for or about the erection, construction or repairing of such building, and also for any engine, machinery or other things placed in said building or connected therewith so as to be a fixture: Provided, that the person claiming the lien shall file the notice prescribed in the second section of this act: Provided, further, that the said lien shall not exceed or be enforced for a greater sum than the amount of the original contract for the erection or repair of said building or buildings."

By the second section, the contractor or sub-contractor, etc., may file the notice of lien at any time during the construction or within three months after the completion of the building. In this case it appears that the contract between the defendant and Walter was dated June 9, 1888. A few days afterward and before the work was begun, Whelan, as sub-contractor, made his bid for the plumbing, according to the plans and specifications, at and for the sum of \$492, which was accepted, and the work begun by him in the same month.

Now, if he had immediately filed his notice of lien, which he could have done under the law, Mrs. Young would have had notice of his claim; her property would have been subject to a lien for the whole amount of work to be done under the sub-contract; she could not have made any arrangement with the builder to the prejudice of the plumber, and the latter would have been perfectly protected, and at the same time Mrs. Young, the owner, would have known exactly how much of the money she had contracted to pay her builder ought to go to the sub-contractor, and would have paid this money to the builder with her eyes open and at her own risk. The objects of the law would have been entirely accomplished.

But the position taken by the complainant is, in substance, that if the notice of lien is not filed until after the completion of the work or after the principal part of the contract price has been paid in pursuance of the contract, still, it operates retroactively, so as to give a lien for the whole amount of the claim, *as from the beginning of the work*, making the payments that have been made in the meantime by the owner to his builder, though in good faith and in perfect accordance with his agreement, to be payments in his own wrong and at his own risk, as if they had been made with full notice and anticipation of the lienor's rights.

Now, this construction of the law, while it does promote one of its objects, viz., the protection of the sub-contractor,

in effect, defeats another, which is the protection of the owner; because it would compel him to pay more than the contract price, against which he is intended to be guaranteed by the second proviso in the first section of the law. That this would be in contravention of the law, in this respect, was held in a somewhat similar case to the present, *Doughty vs. Devlin*, 1 E. D. Smith's Rep., 636, where the court says: "The language is that the owner shall not be obliged to 'pay for or on account of such house,' etc., any greater sum or amount than the price stipulated in and by his contract. Now, if after the house is finished and paid for by the owner, according to his contract, and without any notice of claim being filed, a laborer or material-man may file such notice, have a lien and compel a further payment, the owner is obliged to pay for his house, in consideration of such lien, a greater amount than he contracted to pay."

Is there anything in the law that requires us to hold that the lien of the sub-contractor or material-man is to be considered as binding and operative from a date prior to the filing of the notice? As a rule, it may be safely stated, that where rights or priorities are to be acquired by making notices, conveyances or other instruments a matter of record, they operate only from the date of the record. In times past there were examples of a contrary rule, but any other rule would now be considered unjust, if not absurd.

At common law, a judgment had relation back to the commencement of the term and bound the property then owned by the defendant, though he may have parted with it before the judgment. But this was changed by the Statute of Frauds, which made the judgment operate only from the date when it was docketed.

So, under our old recording acts, if a deed of conveyance was recorded within six months after its execution it had relation back to the date of execution and would prevail over other deeds executed in the meanwhile; but this was so manifestly unjust and offered such plain opportunity for fraud that it was altered by act of Congress of later date,

which gives operation to such instruments, as to third persons, only from the date of their registration.

We may safely say that we ought not to construe any law as operating differently from the general rule above stated, unless we are compelled to do so by very plain language.

Now, our statute does not in terms declare that these liens shall operate from the commencement of the work. It does so, in effect, in a certain class of cases, by providing that these liens shall be preferred to all judgments, mortgages, deeds of trust, liens and incumbrances attaching subsequently to the commencement of the work. As against these, the liens do operate from the commencement of the work and have a retroactive preference and priority. The owner is forewarned that these liens may be filed at any time up to three months after the completion of the work and he shall not be allowed to forestall them by incumbering the property in the meanwhile.

But this is the utmost extent to which the law goes, in giving to the lien a relation backward and a retroactive operation. And all this is entirely inapplicable to the relations between the builder and his sub-contractor or material-men. As to any preference between them the statute is silent, but inferentially we can determine how far such preferences must exist.

The owner has undoubtedly a right to bind himself to the builder to pay the contract price in installments as the work progresses. Building operations would otherwise be impossible. The builder is entitled, upon filing his notice, to a lien on the property for the whole contract price. Two persons, however, cannot have distinct liens for the same debt; and as the law also gives the sub-contractor a right of lien, it would seem to follow that upon filing his notice of lien he intercepts so much of the contract price as the builder is to pay him, and, to that extent, displaces the builder's lien, or right of lien, and becomes lienor in his place. In this way and to this extent, he acquires a preference over the builder. But there is nothing in the statute which requires us to hold that a lien so acquired by the sub-con-

tractor has a retroactive priority over the builder's right to his periodical payments which matured before notice of lien was filed. The owner is forbidden to incumber the property to strangers to the prejudice of either his contractor or the latter's sub-contractors, but he is not forbidden to make his periodical payments to his contractor, as he has agreed to do—for otherwise the work could not go on—unless such payments are arrested in advance by the notice of lien.

As against the owner and the builder the law gives no backward relation to the lien of sub-contractor or material-man and there is nothing in the statute to take it out of the general rule, that the lien should operate only from the giving of notice on the record. And, unless constrained so to do by very explicit language, we certainly would not give to the statute an interpretation that would work such manifest injustice as that which is contended for.

If the lien had been given expressly from the date of filing the notice, but without any restriction as to amount, we would have had to consider the grave question how far such an enactment would be constitutional. But fortunately, as if to meet this very difficulty, the second proviso forbids the lien to be enforced for a greater sum than the original contract.

The idea was advanced in argument, with a slight show of authority for it, that the contract makes the builder an agent of the owner to bind his property by sub-contracts, express or implied.

We do not admit the justice of this view. There is no privity between the owner and the sub-contractor, and the rights of the latter as against the owner are purely statutory and do not grow out of any privity of contract. Otherwise the owner would be bound by every admission and declaration of the contractor in his dealings with his employes and sub-contractors, and would be committed to obligations which he could not anticipate, to persons whom he never heard of. The Court of Appeals of Maryland, in *Treusch & O'Connor vs. Schryock et al.*, 51 Md., 162, very properly, as we think, rejects this theory of agency.

Again it is sought to throw upon the owner the burden of protecting himself by exacting security from the builder and by detaining the price until he is satisfied that all the subordinate parties in interest are paid.

This seems wholly unreasonable. A very special and extraordinary privilege is given to sub-contractors and material-men, of burdening the property of a person with whom they have no privity of contract, upon the simple condition of filing a notice in the clerk's office, which costs no time or trouble and saves the rights of all parties. Surely the burden ought to be upon them of asserting their statutory rights so diligently as to avert loss to anybody.

The sub-contractor necessarily knows that there is a contract and is put upon inquiry as to its terms. But the owner is not informed as to the existence of sub-contracts or as to dealings with material-men and laborers, and it would be imposing a most onerous duty on him to hold that he cannot make a payment to his builder without first canvassing the town to ascertain who have furnished materials or labor to his house, and convening them all, to see that his contractor does not withhold their dues from them. This would be equivalent to holding that he is bound to know and ascertain at his own risk who all these parties are before he receives any notice from them. It is inconceivable that any legislative body ever intended to make the operation of building so hazardous.

The statutes of the different States on the subject differ, and it is, therefore, not easy to find cases strictly analogous to the present; but we conceive the general propositions we have laid down to be sustained by the following cases: *Carman vs. McInrow*, 13 N. Y., 72; *Doughty vs. Devlin*, 1 E. D. Smith, 636; *Dore vs. Sellers*, 27 Cal., 588; *Blythe vs. Poultney*, 31 Cal., 233; *Henley vs. Wadsworth*, 38 Cal., 356; *Renton vs. Murray*, 49 Cal., 185; *Spalding vs. Thompson*, 27 Conn., 373.

The decree is therefore reversed as to the liens which were sustained and affirmed as to the others.

ELIZABETH D. BATTELLE

vs.

NANCY W. CUSHING, WILLIAM O. DENISON
AND DAVID D. CONE.

REAL ESTATE AGENTS; FRAUD; MISREPRESENTATIONS; CAVEAT
EMPTOR.

1. Where statements designedly false have been made by one party to a contract to another who has accepted and acted upon them as true, to his injury, relief will be afforded in a court of equity, against its enforcement, upon the ground of fraud; and rescission will be decreed.
2. Where a real estate agent points out property, not knowing whether he is right or wrong as to its location, his legal culpability is as great, if the purchaser is deceived by his statement, as if he sins against knowledge, instead of in its absence.
3. It is not necessary that fraud should have been deliberately practised by a party relying upon a contract, if it appears that there have been material misrepresentations in fact which were accepted by the party to whom they were made, as true, to his prejudice.
4. A man may act upon a positive representation of fact, notwithstanding that certain means of knowledge are specially open to him, (as *e. g.*, in the public registry), of the real state of things. If the representations are of a character to induce action, and do induce it, that is enough.
5. The rule in private sales, of *caveat emptor*, applies only in the absence of fraud. The rule of law is, that both parties to a contract, whether of sale or not, must act the part of prudence; nothing more is required. In the absence of any misleading word or act by the opposite party, this rule requires each party to satisfy himself before the contract is made.
6. If a real estate agent attempts to act as the agent for another, he will be liable to that other for loss through negligence or misconduct, notwithstanding he makes no charge for his services.

Equity. No. 12,158. Decided July 16, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by complainant from decree dismissing bill. *Reversed.*

The facts are stated in the opinion.

Messrs. R. B. LEWIS and W. V. R. BERRY for complainant (appellant).

Messrs. JOHN F. FARNSWORTH and H. B. MOULTON for defendants (appellees).

Mr. Justice HAGNER delivered the opinion of the Court :

The defendants Denison and Cushing are sued in their own right; and Denison and Cone, as trustees in a deed of trust from the complainant, of the 13th day of May, 1887. The complainant charges that in May, 1887, she called upon the defendant Denison, a real estate agent, with whom she had no previous acquaintance, informed him she had money to invest, and requested him to act as her agent in its investment in the purchase of real estate in the District; that thereupon Denison undertook to advise with the complainant as to what would be prudent investments, and informed her he thought he could purchase for her certain lots lying near Mt. Pleasant, in the District of Columbia; and exhibited a plat of the land, which had been laid out in lots by Leighton and himself as trustees; that thereafter Denison took her out Sixteenth street extended, to show her the lots he advised her to buy, and when they arrived at the property explained that the lots were located on the west side of Sixteenth street; and, with the map before them, from a point on that street where the vehicle in which they had driven was standing, pointed out to complainant a level plateau, west of Sixteenth street and fronting on Kenesaw avenue, and told her that lots which he advised her to buy, numbered 82, 83 and 84 in the sub-division, were located on that level plateau; that the lots then pointed out by Denison, were eligibly and beautifully situated upon the said plateau fronting south on Kenesaw avenue, and as described and pointed out at the time by Denison were in full view from the point on Sixteenth street extended at which the vehicle then stood; that although the land which consisted of parts of Mt. Pleasant and Pleasant Plains had been sub-divided and plotted by the said trustees, yet on the ground itself there were no marks or stakes by which the location of any particular lot could be definitely distinguished

by the eye of a stranger, though the said Denison was well informed, as it was his duty to be, of the location of these particular lots. That thereupon she agreed to purchase lots numbered 82, 83 and 84, believing them to be located on said level ground and plateau fronting on Kenesaw avenue, as described and pointed out by Denison; that he stated the lowest sum the owner would sell the same for was thirty cents per square foot, making the purchase price amount to nine thousand dollars; and the complainant being earnestly advised by Denison to buy, agreed to purchase them at that price, and to pay for the same one-third cash, and the residue in one, two and three years in equal installments. That thereafter Denison named the defendant Nancy W. Cushing, as the owner of said lots; and required the complainant to deposit with him three thousand dollars as the cash payment on the purchase; and thereafter presented to the complainant a deed in fee conveying the lots to her, and she thereupon executed three several notes for two thousand dollars each and also a deed of trust to Denison and Cone, trustees, to secure the deferred payments. That at the time of the purchase and sale of said lots she had no communication with Mrs. Cushing, and she does not remember ever to have seen her; that during the progress of the negotiations and at the time Denison took her out for the purpose of showing her the said lots on Sixteenth street extended, and since that time, the said Denison has frequently represented to the complainant that said lots were very valuable, and the money agreed to be paid therefor would be a safe and sure investment, and though unimproved, could be readily sold at any time for the price agreed to be paid, and that they were located where real estate was surely increasing in value.

That when the note for the first deferred payment became due she paid it to Denison, and has paid the interest semi-annually on all the notes for deferred payments up to November, 1888, from the date of the sale in May, 1887; that resting satisfied the lots she had bought and for which

deeds had been made to her, were located beautifully on the level ground on the plateau pointed out to her, and trusting to the representation of said Denison, she left the management of the lots, and of other property subsequently bought by him for her, in his hands; and made remittances to him from time to time, when required by him, of such sums of money for payment of taxes and interest as became due on said property; that she remained in Washington City but a short time after the purchase of said lots, living principally since that time in New York and Europe, and only returned to the city of Washington to reside permanently about the 18th day of September, 1889; that she looked upon said Denison as her agent employed and acting in her interest in all of said transactions, and never heard that in the sale of the aforementioned lots he had been employed by and was acting as the agent of the said Nancy W. Cushing and in her interest and behalf until about the 20th day of September, 1889, when being in this city for the purpose of looking after her property here, she went out to examine the location of the lots, and then being told that they were not where Denison had informed her they were located, she employed a surveyor to ascertain definitely the location, and was astonished to find she had been wilfully and treacherously deceived by Denison; as she found said lots were located in and upon the sides of a steep ravine, lying as it were in a gorge, and that but a very small part, if any, of them could be seen from the point on Sixteenth street extended where Denison had stopped to point them out to her; that instead of being located on a plateau and on level ground, and being valuable, they were at the time they were sold to her worthless, and are now of little or no value, the same being, as she is informed, not salable; and that it would cost thousands of dollars more than she paid for them to fill them in and make them available for building purposes, or salable; that then for the first time she was informed and discovered that Denison was acting at the time of the sale to her as the agent of said Cushing and altogether in

her interests for the sale of the lots, which fact had been kept concealed from the complainant; and complainant says, that both Cushing and Denison now assert that the said Denison was the agent of the said Cushing, and did act as her agent in the sale of the said lots to your complainant; that Denison thus acting as the agent of said Cushing, did, with the intention of deceiving, grossly, treacherously and fraudulently misrepresent the location of said lots for the purpose of inducing the complainant to buy the same, and to pay the large price asked for them, and that by the actings and doings and statements of the said Denison, agent of the said Cushing, complainant was treacherously deceived and fraudulently dealt with, and thereby was induced to purchase said lots, believing them to be differently located than where they are now found to be, and believing them to be valuable lots; and that by reason of such conduct on the part of Denison the sale of the property was effected to the complainant at a price grossly in excess of its value. She prays that the sale and transfer of the lots to her may be rescinded, and the defendants, Cushing and Denison, required to repay and refund to her all the money, principal, interest and taxes paid by her on account thereof, and that the promissory notes given for the deferred payments be delivered up and cancelled; and that the defendants, Cushing and Denison, be enjoined from transferring the promissory notes referred to; and from advertising said lots for sale under the deed of trust referred to.

Mrs. Cushing, in her answer, stated she had formerly owned the lots described in the bill, and that the same were sold to the complainant and promissory notes executed, money paid and deed passed; that the sale was conducted by Denison as her agent, and was fairly and honorably conducted; that he had no interest, except as her agent, in said lots or any of them.

Denison answered, admitting he was in the real estate business as alleged; that in the spring of 1887 the complainant called upon him and expressed a desire to purchase

some real estate in the District; that he told her he had some lots for sale belonging to the defendant Cushing, being the same lots mentioned and described in the complainant's bill, and exhibited to her a plat of the property as it had been surveyed and recorded; that at the time she purchased, said lots had not been staked out nor were there any landmarks, stakes or monuments to indicate where their boundaries were; that at the time the sub-division and plat were made by the surveyor, the outside lines, including the whole sub-division made by Leighton and himself as trustees, were ascertained, and the sub-division was made and platted as recorded, without surveying and staking out the several lots, and this defendant had no more knowledge or means of knowing the precise location of said lots and their boundaries than any other person who might examine the plat and go upon the ground, and from the range of the streets crossing it, judge approximately where the said lots lay; that he did take the complainant out to look at the property, as stated in the bill, and showed her, as nearly as he was able to, without particularly tracing the lines of said lots by a survey, where the lots lay, but he denies he stated to the complainant that said lots were upon level ground; but on the contrary he alleges that at the time of showing her the said lots he said to her, as he pointed them out, that the ground was uneven and rolling.

He admits the purchase of said lots, but says he was never employed to act as the agent of the complainant; that in selling her the lots he was acting as the agent of the defendant Cushing, and the complainant was so informed; that this defendant had no interest in said lots or the sale of the same, excepting the ordinary commission for making the sale, as the real estate agent of the defendant Cushing; that at the time of making such sale to the complainant, one House of Congress had passed a bill for the creation of a park along Rock Creek, which would be in the immediate vicinity of the said lots, and real estate in that vicinity sold very readily for good prices, and if he had not sold the lots to

the complainant he could have easily and readily sold them to other parties at the same price.

He denies that he ever misled, deceived or defrauded the complainant in any manner whatsoever; says the said lots are valuable property; that they do not lie in a gorge, and it would not cost more than the price paid for them to fill them and make them available; that he is informed and believes, and so charges the fact to be, that after this defendant's wife had taken the complainant to see the property, he took the complainant a second time to see it; that they went upon the ground, and with the plat of the property before them, the street called Kenesaw avenue was pointed out to the complainant, and a fence bounding the west side of said lots was shown to her, and she was informed that the lots fronted south on said avenue, and were on the west side of said plat next to the fence; and the defendant alleges that neither by concealing, misdirection, deceit, nor in any other manner, did he mislead, cheat, deceive or defraud the complainant, intentionally or knowingly; that the negotiations and sale were open, fair and honorable on his part.

The case was heard below on the pleadings and testimony, and the bill dismissed; and the propriety of that action by the judge below is the question now before us.

The testimony was voluminous, and applies to all the points presented by the contestants.

First. It was contended the complainant was deceived by Denison's statements as to the value of the lots in May, 1887, and that thirty cents was a grossly excessive valuation. Seven witnesses were examined as to their value on behalf of the complainant. The statement of John A. Settle, a real estate agent, is that he would not then have given five cents a foot for the lots, and that their present value was no higher. Rudolph H. Evans says no portion of the lots is available for buildings, and that they were worth less than five cents. Mr. Leighton, one of the trustees who made the sub-division, and who sold the lots to Mrs. Cushing, in March, 1887, testified (after Mrs. Cushing and Mr. Deni-

son had each refused to give the information), that she purchased them at eight cents per foot; that they were the poorest lots on the tract, and the last sold, and that the price obtained was the highest the trustees could get for them. Although we can only look to the record in deciding as to the intelligence and competency of the witnesses, we cannot disregard the fact shown by the proof, that Mr. Leighton is a solicitor of this court and extensively engaged in real estate operations in the immediate neighborhood of these lots; and greater weight would properly be given to his estimates, because of these circumstances. Mr. Pairo, another witness for complainant, also a member of the bar, was one of the syndicate that purchased portions of this sub-division. He says he is thoroughly acquainted with the location of the lots and their value, and that he would not have given over ten cents a foot for them. Joseph R. Hertford, a real estate agent, says the lots were worth, at the time of the purchase, about ten cents a foot. John A. Butler, a real estate agent, states their value at eight cents a foot. Benj. P. Davis, who lives in Mt. Pleasant, very near the property, and says he has been over the place hundreds of times, testified that in the Spring of 1887, the property was worth seven or eight cents a foot. The average of those values is less than eight cents. The only witness examined on the part of the defendants, directly as to the value, was the defendant Denison, who says the lots were worth thirty cents, which is the price at which he sold them to complainant. Mr. McPherson, who is the owner of lots 71 to 81, opposite this property, testifies he bought them at fifteen cents; but makes no statement as to the value of the lots in controversy: assuming, however, that he would have valued them at the price he paid for those he bought, the average of those two estimates would be twenty-two cents.

The average of all the estimates would place the value in May, 1887, at ten cents a foot, instead of thirty cents, which Denison assured the complainant was cheap for the lots.

Second. In considering whether there was a deception practiced by Denison, in his representation to complainant, of the actual location of the lots, the testimony of Mr. Looker, a civil engineer, who informed himself of the lay of the land from actual surveys and levelings, is entitled to great weight. Mr. Looker produced the surveys, with plats showing the topography of the land, with measurements of its inequalities. It appears from his evidence, as well as from the other testimony for the complainant, that Sixteenth street extended runs nearly north from Columbia road, crossing what is called Kenesaw avenue, which traverses this sub-division from east to west. As we have seen, these lots lie to the extreme west of Sixteenth street extended, and are laid down on the plat as fronting on the north side of Kenesaw avenue. Looker shows that the lots lying immediately at the intersection of Sixteenth street and Kenesaw are quite level; perhaps a little higher than Sixteenth street. From this point the land begins to slope towards the west and south; and on his plats are circles delineating the rate of fall, at distances of five feet apart, from Sixteenth street to the western boundary.

When the extreme western limit of the land is reached, where lots 82, 83 and 84 are located, their southern front is shown to be forty feet lower than the point of intersection of Sixteenth street and Kenesaw avenue. A large part of their area lies in a ravine, which begins about 180 feet from that point of intersection. The first lot west of the top of the ravine lies just below the average trend of the land; the succeeding lots to the west continue to fall off, until the three lots in question are reached, on the western extremity of the sub-division, where the bed of Kenesaw avenue is at least forty feet lower than the starting point. So that if Kenesaw avenue alone were filled up to grade at its western limit, it would be forty feet higher than the western portion of these lots; and to build on them after the filling of the avenue, would necessitate their being filled to its level. There is no conflict of testimony upon this point.

Third. This being the state of facts, we are to examine what were the representations made by Denison to the complainant as to the lay of the land and whether they accorded with the facts.

The complainant and Denison agree that Mrs. Battelle expressed the wish to examine the lots before she should make the purchase and that he took her out in a carriage to show them to her. She swears that he halted it on Sixteenth street extended, a little south of the point of intersection of that street with Kenesaw avenue, and from that place professed to point out these lots, as lying in full sight and on a level plateau. It is testified by Mr. Looker, and illustrated by his map, that a person sitting in a carriage, at the point referred to, at six feet above the surface of the road, would be unable, in consequence of the falling off of the ground from that point, to see any part of these lots except a high mound near the extreme north boundary of the most eastern lot—No. 84. Looker further states that the same is true as to every point on Sixteenth street, between Kenesaw avenue and a point 265 feet north of the intersection; and that, until that distance has been traversed, there occurs no place from which one can see, from Sixteenth street, any part of either of the three lots, except this mound on the eastern end of the land.

Mr. Denison denies that the point from which he first showed the lots to Mrs. Battelle was on Sixteenth street at all. But he admits that, on what he calls his second visit, he did show her the land from a position in that locality. His testimony, on cross-examination, is as follows:

“Q. You have stated that you drove out a second time with Mrs. Battelle. When was that?—A. It was after the first time. Q. How long?—A. I do not remember how long. Q. Have you any idea; can you tell whether it was a day, a week or a year afterwards?—A. I cannot tell; I know it was not a year by a good deal; I cannot tell how soon it was. Q. State what was the purpose of the drive the second time.—A. She went out and looked around in

that direction and drove out that way to this sub-division through Mt. Pleasant. Q. Where did you start from with Mrs. Battelle?—A. I am not certain whether we started from the office or from her house. Q. Who drove with you when you went with her this second time?—A. I think her two daughters were with her; I drove the carriage myself. Q. What course did you take?—A. Well; I could not state exactly what course we did take to go out. Q. Did you stop anywhere on that drive to look at the property?—A. Yes, *we stopped at Sixteenth street extended.* Q. Where did you stop?—A. *We stopped somewhere near Kenesaw avenue;* I think we drove on beyond and came into Park street, as near as I can recollect; I think we drove around Pierce Mill and returned to her home by Tennallytown and Woodley Inn road. Q. What was your object in stopping *near Kenesaw avenue on Sixteenth street*?—A. I think she wanted her daughters to see where the lots were. She pointed and said, 'there are my Kenesaw avenue lots,' or something to that effect to the daughters."

And yet, according to Mr. Looker, as we have seen, it is utterly impossible for anybody occupying the position thus described, to see any part of these lots, except the mound near the northern boundary of the eastern lot. Mrs. Battelle, however, denies that she ever made a second visit to the locality with Denison, and her daughters swear positively they never took such a drive as is referred to, or any drive with Mr. Denison.

If Denison made but one visit to the land with Mrs. Battelle, then his testimony above quoted sustains her as to the spot from which he professed to point out the lots.

Denison's testimony, as to what he calls the first visit, is that after they had reached Kenesaw avenue, they drove to the west of Sixteenth street, upon some vacant land south of Kenesaw avenue, to a point about one-third or one-half the distance between Sixteenth street and the western boundary, and from there he showed her the lots.

In his answer, filed at a time much nearer to the time of

the occurrence, he said: "This defendant has no more knowledge or means of knowing the precise location of said lots and their boundaries than any other person who might examine the plat and go upon the ground and, from the range of the streets crossing it, judge approximately where the said lots lay;" while in his testimony he claims to have pointed out the very lots, and to have said to her, "there are your lots." But if the description given of the land by all the witnesses is correct, it seems incredible that Mrs. Battelle, or any person of sane mind, would have bought such lots at such a price after having actually seen the ravine she was invited to buy. No one could look at them without seeing at once they were far below any available grade, much the greater part being in a ravine, forty feet deep at the extremity. Two months before, Denison had conveyed them to Mrs. Cushing, in whose house he had lived, for a consideration not stated in the deed, but really for eight cents. What had since occurred to quadruple the value? The wife of Denison was called as a witness. As a matter of course, her testimony was not admissible, and I shall make no comment upon it. The colored driver, who took Mrs. Battelle out there with Mrs. Denison, says they went on land south of the lots and there Mrs. Denison produced the plat and pointed out the lots "in a general way; there was no ravine we could see from where we stopped to show Mrs. Battelle these lots."

It is impossible this witness could have been looking at these lots, if he saw no ravine, unless every other witness in the case is mistaken as to their location, except Mr. Denison, who in his testimony says: "I don't think there is a ravine there. I think it is below." This was a repetition of a previous statement by him, soon after the bill was filed, which will now be noticed.

Among the witnesses examined for the complainant was a reporter, who produced his notes of an interview with Mr. Denison immediately after a newspaper publication of the substance of the bill; and testified to their accuracy. Deni-

son's statement to the reporter on this point was, "there was no ravine there; in some places the land sloped a little and is inclined to be undulating, but that is more to its advantage than hindering it, and certainly did not detract from its valuation."

Upon the whole case, after giving every possible allowance to the testimony on the other side, we cannot doubt that Mr. Denison professed to point out the location of the lots to Mrs. Battelle from a point from which it has been made perfectly apparent they could not be seen. As one of the trustees, it was his duty to have acquainted himself with the location and character of all the lots he was intrusted to sell. The previous difficulty of selling these particular lots would naturally have brought them especially to his notice—particularly as he had caused them to be conveyed to Mrs. Cushing two months before. It is almost impossible to believe he was ignorant of their situation and defects. If he suppressed his knowledge to deceive her, his act was a conscious fraud. And it is of course settled that where statements, designedly false, have been made by one party to a contract, to the injury of another, who has accepted and acted upon them as true, to his injury, relief will be afforded in an equity court against its enforcement upon the ground of the absolute fraud, and rescission will be decreed. On the other hand, if, as his answer avers, he had no more knowledge or means of knowing the precise location of the lots than any one else who might examine the plat, why did he not tell her so? Why did he go out there at all, unless he was able to comply with her reasonable request—to be allowed to examine the property in which he was advising her to invest \$9,000? If he pointed out property, not knowing whether he was right or wrong, his legal culpability was as great if she was deceived by his statement, as if he had sinned against knowledge, instead of in its absence.

Third. It is held not to be necessary that fraud should have been deliberately practised by the party relying upon

the contract, if it appears there have been material misrepresentations in fact, which were accepted as true by the party to whom they were made, to his prejudice. In this case it is contended, as the complainant had the opportunity to take the plat, go to a surveyor before purchasing, and find out exactly the location of the land and thus secure herself against imposition from Denison's statements, the court should not interfere. This objection is answered in Bigelow on Fraud, 523, 528, in these words: "The proposition has now become very widely accepted at law, as well as in equity, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him, although he had legal notice, as *e. g.*, in the public registry, of the real state of things. * * * If the representations were of a character to induce action, and did induce it, that is enough. It matters not, as it has been well declared, that a person misled may be said, in some loose sense, to have been negligent (in reality negligence is beside the case where the misrepresentation was calculated to mislead and did mislead); for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'you were yourself guilty of negligence.' This, indeed, appears to be true, even of cases in which the injured party has in fact made a partial examination. Nor is the rule applicable merely to cases which, in some respects, stand upon special grounds, as, *e. g.*, suits for specific performance; it applies to rescission equally and, indeed, is a general rule."

Again: "The rule in private sales, of *caveat emptor*, has nothing to do with the case; that rule applies only in the absence of fraud. The truth is, the maxim of *caveat emptor*, in the light of the later and better authority, has been overworked. The rule of law, obscured somewhat in the application of that maxim, is simply this, that both parties to a contract, whether of sale or not, must act the part of prudence; nothing more is required. In the absence of any misleading word or act by the opposite party, this rule re-

quires each party to satisfy himself before the contract is made; in the presence of a truly misleading word or act, *i. e.*, such as might mislead a prudent man, prudence will be satisfied, if the rule means anything, by the acceptance of that word or act." The text is supported by abundant authorities, to some of which we will refer.

Schwenk *vs.* Naylor, 102 N. Y., 683, was the case of a sale of land with question of the location of the line. "The plaintiff saw it before him, but was not bound then and there to examine the title, especially when the defendant professed to know all about it, and the extent of the property."

In Redgrave *vs.* Hurd, 20 Ch. Div., 1, it was said: "Where one person induces another to enter into an agreement with him by a material misrepresentation, which is untrue, it is no defence to an action to rescind the contract, that the person to whom the representation was made had the means of discovering, and might with reasonable diligence have discovered that it was untrue."

So where the injured party might have learned the representations were false by searching the records of the Patent Office; as in McKee *vs.* Eaton, 26 Kan., 231.

In Starkweather *vs.* Benjamin, 32 Mich., 305, the court said: "It is no defence to an action for fraud in misrepresenting the quantity of land in a parcel the defendant is selling the plaintiff by the acre, that the latter saw the land and was as able to judge of its size as the defendant. A positive assurance of the area of a parcel of land made under such circumstances, is very material, and if it be false, and the vendee is deceived by it, he has a clear right of action for the fraud."

In Walsh *vs.* Hall, 66 N. C., 243, it was held that "A purchaser of land is not required, in order to guard against the fraudulent misrepresentations of a vendor, to have a survey made."

And in Holland *vs.* Anderson, 38 Mo., 55, it was said, "Fraudulent misrepresentation and concealment by a vendor of land as to nature, quality, quantity and situation, affecting

the whole subject-matter of the contract, will entitle the vendee to relief."

There is much justice in the position assumed by the court in *Hale vs. Philbrick*, 42 Iowa, 81: "We are not inclined to encourage falsehood and dishonesty by protecting one who has been guilty of such fraud, on the ground that his victim had faith in his words, and for that reason did not pursue inquiries which would have disclosed the falsehood."

"If the omission to prosecute the examination fully was due to the opposite party's representations or other acts, that omission cannot be charged against the injured party. It is enough that they were calculated to induce him to rely upon them, and that he did rely upon them." *Bigelow on Fraud*, 525.

Fourth. The complainant further insists upon the rescission of the contract, because Denison, while professing to act as her agent in the transaction, was also acting as the agent of Mrs. Cushing; invoking the elementary principle, that if one undertakes to make sale of property as agent of the owner, he cannot at the same time act as agent for the purchaser. The duty and interest of the seller being to insist upon the highest possible price, while the interest of the purchaser is to obtain the property at the lowest rate, the agent cannot serve two masters in such a transaction except to the manifest injury of one or the other. That Denison allowed Mrs. Battelle to understand he was acting as her agent we think is established by the weight of the evidence as to the transaction itself, and by his subsequent conduct. Mrs. Battelle swears positively she employed Mr. Denison as her agent to invest her money; telling him explicitly she wished him to act in that capacity and purchase land for her; that she had no other agent in the transaction; that he had received from her no other appointment as agent, although he repeatedly paid the taxes on these and other lots he, as her agent, purchased for her subsequently; that confiding in his advice as her man of business, instead of "drawing off" her money from the North in sums of \$5,000 per month to

pay for the lots, and as she proposed to do, she was persuaded by him to borrow the money on her house on P street, which was conveyed to Denison and Cone in trust; and that with no further employment as agent he continued to correspond with her about her business generally, and frequently advised as to the lots, as appears from the letters produced, in one of which in March, 1888, in reply to a letter asking his advice as to the propriety of advertising the lots, he wrote: "My advice to you is emphatically not to put any of your lots in market *now*. If you commit yourself to any figure it will have a bad effect." In an interview with Denison at Mrs. Battelle's house, when they were about to leave the city, the two daughters swear their mother called them into the parlor and introduced them and said to him: "These are my daughters, Mr. Denison, and I want you to look at them well that you may know them again, for if anything should happen to me, I shall expect you to look after their interests, as it will be their money that is to be invested." One of them testifies that twice afterwards she called on Denison at his office and consulted him about the lots, dealing with him as her mother's agent.

Mrs. Battelle on two occasions, when he presented his account of receipts and disbursements, said to Mr. Denison she saw no charge made therein for his services, to which he replied, "Oh, never mind that now." As she expected him to sell the property for her and then pay himself, she did not then press the matter further. But even if he had no purpose to make a charge for his services, he would equally be liable for loss to her through negligence or misconduct, if he undertook to act as her agent. *Williams' Exr. vs. Higgins*, 30 Maryland, 404.

Surely under the circumstances the complainant was justified by the acts of Denison in concluding he was acting as her agent in the transaction in question, and we believe he really assumed to do so.

There are many facts testified to in the case to which we

have not adverted, giving an unfavorable aspect to the transaction, as against Denison, and none of an opposite import; but the length of this opinion forbids us to refer to them here, though the entire record has been carefully examined.

Without prolonging the discussion further, we are satisfied we should grant the relief asked by the complainant, and shall sign a decree to that effect.

FECHHEIMER, GOODKIND & CO.

vs.

JUSTUS HOLLANDER, SAMUEL BIEBER ET AL.

ASSIGNMENTS, FRAUDULENT INTENT; BONA FIDE PURCHASERS.

1. An assignment preferring certain creditors, made with the intent on the part of the assignor to defraud other creditors is void, notwithstanding the preferred creditors are not participants in that fraud.
2. The statute of 13 Eliz. Ch. 5, relating to fraudulent conveyances, is in force in the District of Columbia, in its original form by transmission from Maryland.
3. An assignee in an assignment for the benefit of creditors is not a *bona fide* purchaser for a valuable consideration, within the meaning of 13 Eliz. Ch. 5.
4. A fraudulent purchase and subsequent assignment may be so connected by the purchaser and assignor as to constitute one transaction, and thus make the assignment a fraud intended from the beginning to affect the defrauded vendor.

Equity. No. 10,107. Decided August 8, 1892.

The CHIEF JUSTICE and Justices COX and JAMES sitting.

Hearing on an appeal by the complainants from a decree dismissing a bill to cancel an assignment for the benefit of creditors. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. JAMES FRANCIS SMITH and S. S. HENKLE for complainants (appellants):

1. The intent of the assignor in making the assignment is the material consideration in determining as to its validity where it is assailed as fraudulent, and the prevailing rule is that a fraudulent intent on the part of the debtor alone is sufficient to avoid the assignment without proof of any notice of or participation in the fraud on the part of the assignee or creditor. Waite on Fraudulent Conveyances, Sec. 319; Rathbun & Dow *vs.* Platner, 18 Barb., 273; Foley's Adm'rs *vs.* Bitter et al., 34 Md., 653-4; Wilson *vs.* Forsyth, 24 Barb., 120; Donaldson *vs.* Farwell, 93 U. S., 633; Root *vs.* French, 13 Wend., 570; Dogget *vs.* Herman, 16 Fed. R., 815.

2. An assignee for the benefit of creditors is not a purchaser for a valuable consideration, and stands in no better position than the assignor. Knowles *vs.* Lord, 4 Whart., 500; Clements *vs.* Berry, 11 How., 409; Root *vs.* French, 13 Wend., 570; Ratcliffe *vs.* Sangston, 18 Md., 390.

3. If a purchaser knows himself to be insolvent, and buys goods not intending to pay for them, the sale is voidable, even though there be no positive misrepresentation. Powell *vs.* Bradlee, 9 Gill and J., 279; Johnson *vs.* Monell, 2 Keyes, 655; Donaldson *vs.* Farwell, 93 U. S., 633.

Mr. LEON TOBRINER for defendants (appellees).

Mr. Justice JAMES delivered the opinion of the Court:

On the 7th of July, 1886, the complainants recovered judgment in this court against the defendant Hollander for the sum of \$1,000, with interest, at the rate of seven per cent. per annum, from the 15th day of February, 1886, upon which execution was issued and returned *nulla bona*. On the 15th of June, 1886, Hollander, who had for several years been engaged in the clothing business in the city of Washington, made a deed of assignment to the defendant Bieber of all his property, excepting his household furniture, but including all the stock in trade, fixtures, etc., upon the premises known as No. 1217 Pennsylvania avenue. At

the same time Hollander was further indebted to the complainants, for goods purchased on the 2d, 7th and 15th of April, 1886, to the amount of \$1,846.50; and the complainants held his note for \$1,000, dated February 15th, 1886, payable five months after date, with interest at the rate of seven per cent. per annum until paid.

The bill prays for discovery by the defendant Hollander, concerning certain matters, and for the appointment of a receiver, and asks that in final hearing the deed of assignment to Bieber shall be declared fraudulent and void as against the plaintiffs, and decreed to be cancelled; and that out of the proceeds of the sale of the goods the amount found due to the plaintiffs be ordered to be paid.

It appears that all of the indebtedness of Hollander to the complainants was for goods sold to him by them.

The evidence satisfies us that at the time of his purchases from the complainants in 1886, the defendant Hollander had only about three thousand dollars worth of stock, and was indebted for more than six times that amount. In that condition of his affairs he made new purchases to the amount of \$19,791.71 as stated at the argument by his counsel, or to the amount of \$21,085.54 as claimed by counsel for complainants. It is shown that his experience in making sales had determined the fact that he had no ground to expect, and could not have expected to sell during that season so much as one-half of the goods newly purchased by him. Without going into details, we think it enough to say that we are satisfied that he must have contemplated, at the time of his purchase from complainants in 1886, the use of the goods, or of a large part of the goods so purchased, in applying them by assignment for the benefit of the preferred creditors afterwards actually named in the deed referred to. We do not mean to say that a fraudulent purchase of goods renders a subsequent assignment of them for the benefit of other creditors fraudulent as against the defrauded vendors; but we conceive that such a fraudulent purchase and subsequent assignment may be so connected by the pur-

chaser and assignor as to constitute one transaction, and thus make the assignment a fraud, intended from the beginning to affect the defrauded vendor. The transaction before us appears to us to be of that character. We are of the opinion, that Hollander made his purchases in the spring of 1886 with the intention, if it should become necessary, to apply them in satisfaction of preferred creditors. This, we hold, made such an assignment a fraud on the vendors of those goods.

It does not appear, however, that either the assignee or the preferred creditors knew anything about the circumstances of these purchases. In other words, it does not appear that they participated in any fraud connected with the assignment. We have to deal, therefore, with the disputed question, whether an assignment for the benefit of preferred creditors may be held to be void when it was the intent of the assignor to thereby defraud his other creditors, although the creditors provided for in the deed were not participants in that intent.

On this question there is some conflict in the decisions of the state courts and in the conclusions of the text-books. Mr. Burrill states that it is immaterial whether the assignee or the creditors participate in the fraudulent intent of the assignor. Mr. Waite says: "Generally speaking the subject of inquiry in these cases is the intent of the assignor or debtor, though there is authority tending to establish the rule, that the fraudulent purpose sufficient to defeat the instrument must be participated in by the assignee or beneficiaries * * * Recognizing the general rule, elsewhere discussed, that a voluntary conveyance or gift may be annulled at the instigation of creditors without proof of an absolute fraudulent intent on the part of the donee, it would seem to follow by analogy that the cases, which hold that proof that the fraudulent intent of the debtor or assignor, is sufficient, establish the more logical and salutary rule." On the other hand, Mr. Bump, citing almost identically the same authorities, reaches an opposite conclusion.

In *Cadogan vs. Kennett, Cowp.*, 434, Lord Mansfield said: "The principles and rules of the common law, as now universally known and understood, are so strong in every shape, that the common law would have attained every end proposed by the statutes of 13 Eliz. Ch. 5 and 27 Eliz. Ch. 4." However this may be, it has been considered important in almost every State in this country to re-enact those statutes substantially. In the process of condensation new phraseology has in some cases been used, and it has been suggested that this has to some extent led to the conflict referred to. In this District, however, the statute of 13 Eliz. Ch. 5, is in force in the original form by transmission from Maryland. *Sexton vs. Wheaton*, 8 Wheat., 242. For reasons which will be explained later in this opinion, we shall first consider the particular question before us as one of principle.

The provisions of the statute are substantially as follows: "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances * * * as well of lands and tenements as of goods and chattels * * * which feoffments, gifts, etc., have been and are devised and contrived of malice, fraud, covin, collusion or guile, *to the end, purpose and intent to delay, hinder or defraud creditors* and others of their just and lawful actions, suits, debts, etc.

"Be it therefore enacted, that all and every feoffment * * * alienation, bargain and conveyance of lands * * * goods and chattels * * * to and for any *intent or purpose before declared and expressed* shall be from henceforth deemed and taken (only as against that person * * * whose actions, suits, etc., by such fraudulent devises as aforesaid, are, shall or might be in any wise * * * hindered, delayed or defeated) to be * * * utterly void and of no effect.

"And be it further enacted, that all and every the parties to such fraudulent feoffment, gift, etc., being privy and knowing of the same or any of them, which * * * shall wittingly and willingly put in use, maintain, etc., as true and

done *bona fide* and upon good consideration; or shall alien or assign any of the things before mentioned, to him or them conveyed as is aforesaid * * * shall incur the penalty and forfeiture of, etc.

"Provided also, and be it further enacted, that this act or anything therein contained shall not extend to any estate or interest in lands * * * goods or chattels had, conveyed or assigned * * * which estate or interest is or shall be, upon good consideration and *bona fide*, lawfully conveyed or assigned to any person not having at the time of such conveyance or assurance, to them made, any manner of notice or knowledge of such covin, fraud or collusion, as aforesaid."

Stated in brief terms, these provisions declare that every alienation of real or personal property made to the end and intent of hindering, delaying or defrauding the creditors of the alienor, shall be of no effect as an alienation, except when such alienation is made to an innocent purchaser for a valuable consideration.

The statute contains a plain affirmance of what was already a principle of the common law, namely, that it is a right of the creditor that the debtor's means of payment should be applied to the satisfaction of his debt. Although this is only a right to have an action for the enforcement of such application, it is such a relation to the property itself that a fraudulent disposition thereof is an immediate and direct injury to the creditor. His right controls the debtor.

It is only an application of this principle to say that, for the prevention of any fraud on him, the creditor's right is superior not only to the debtor's right, but to that of any third person who takes the debtor's place in such a way that he acquires no separate right of his own, by which he has no new or better claim to immunity. If such third person does no act which originates in him a better right than that of the debtor, the law regards him as having the same status. In that case his innocence of any fraudulent intent will not protect him. The question is simply one of the

status. In short, he is treated as simply not having become a new owner. But when a third person does some act or gives something in exchange for the debtor's property, he acquires an original right to it, provided he has acted properly in undertaking to become owner at all. It is then for the first time that any inquiry into the propriety of his conduct arises, and the question to be considered is, whether, under all the circumstances, he had a right, as against the creditor, to become owner of what the debtor should have applied to the payment of his debt. This elementary principle is formulated by saying that he must appear to have become owner in the usual manner, that is to say, by purchase for value exchanged for the property in good faith and without notice of any reason why he should not acquire it. On principle, then, a third person who merely takes the debtor's status assumes that status subject to whatever impaired the debtor's capacity, and it is not helped by his own innocence of any fraud in fact, and on principle his own innocence will protect him in the other cases.

This principle we conceive explains the meaning of the statute of 13 Eliz. Ch. 5, and shows that participation in the fraud of the alienor becomes a test question as to the rights of the alienee only when the latter is a purchaser for a valuable consideration. To apply this test then, the question in cases of general assignment for the benefit of creditors is, whether the assignee or the creditors can properly be considered purchasers for valuable consideration.

As a matter of fact this test has been applied in all of the well considered State decisions, and in the commercial States it has been held that the creditor does not become such a purchaser by means of the trust. In *Griffin vs. Marquardt*, 17 N. Y., 30, the Court of Appeals of New York said: "An assignee in trust for the benefit of creditors is not a purchaser for a valuable consideration, however innocent he may be of participation in the fraud intended by the assignor. The uprightness of his intentions, therefore, will not uphold the instrument, if it would otherwise, for any reason, be

adjudged fraudulent and void." In *Knowles vs. Lord*, 4 Whart., 500 (506,7), the Supreme Court of Pennsylvania, speaking through Seargeant, J., said: "Neither the assignee nor creditors, in any sense of the word, purchased these goods—they were assigned in common with all the estate of the assignors; the assignors alone prescribing the terms of the assignment, the methods of appropriation, the subsequent sale of the property by the assignees to raise the funds, and the persons who were to participate in them, as well as the order and conditions according to which they were to be distributed. * * * It would be a solecism to call such a transaction a sale or such a grantee a purchaser, or to apply these terms to the creditors.

"Such a conveyance cannot be called a sale, or such creditor a purchaser. * * * A real purchaser giving value for property in the course of business innocently, and acting on the faith of possession and other apparent marks of ownership, is favored for the support of trade and encouragement of fair dealing, and may sometimes obtain a better title than his vendor. But a voluntary assignment by a debtor has never been considered as placing the assignee in any better situation in point of equity than the assignor himself was; he takes the estate subject to all outstanding equities, liens, incumbrances and dealings between the assignor and others."

We have quoted this case at some length because it demonstrates clearly the principle on which assignees and creditors are denied the protection given by the fourth section of the statute 13 Eliz. It has been said that the payment of debt constitutes a valuable consideration; this case points out that something must be given up in exchange to constitute the alienee a purchaser within the meaning of the statute.

It is worth while to observe that the later decisions in some of the States which adopted the doctrine that an assignment for the benefit of creditors could be held void only when the creditors participated in the fraudulent intent

of the assignor, indicate that a different conclusion would be reached if that question were still open. In the Governor *vs.* Campbell, 17 Ala., 566 (571), Davgan, C. J., who delivered the opinion of the court, said: "The fifth charge was, that if I. M. Frion intended to delay, hinder and defraud his creditors but the trustees and preferred creditors did not join in that intent, the deed was valid. If the question raised by this charge could be considered as an open one in this court, I should willingly hold that the court erred, for the fraudulent intent of the grantor must render the deed void as against creditors intended to be defrauded by it, unless the grantee can place himself on a ground or in a condition not to be affected by the fraud, and I know of no condition that such a grantee can assume to avoid the effect of the fraudulent intent of the grantor, unless it be that of a *bona fide* purchaser for a valuable consideration without notice. But we are satisfied that the previous decisions of this court settle the question, that the fraudulent intent of the grantor alone in a deed of trust cannot affect the rights of the creditors intended to be secured by it unless they have participated in that intent."

And in Hunt *vs.* Weimer, 39 Ark., 70, 75, the court used this language: "Perhaps the rule which requires the grantee to participate in the fraud, in order to avoid the deed (a deed of assignment) has no just application, except in case of purchasers, or persons who have parted with some valuable right."

It is claimed, however, on the part of the defendants, that the Supreme Court of the United States has settled the rule, that in all cases of assignment for the benefit of creditors, the participation of the creditors in the assignor's fraudulent intent must be shown, in order to avoid the assignment. We have therefore to explain carefully the effect of the decisions referred to.

In the case of Clements *vs.* Berry, 11 How., 398, it appeared that a deed of trust for the benefit of preferred creditors had been made by Berry in immediate anticipation

of a judgment against him, from which the plaintiff was omitted. Mr. Justice McLean, speaking for the majority of the court said: "The trustee in this case cannot be considered a purchaser, as the assignment was made to him, not on purchase for a valuable consideration, but for the benefit of certain creditors." We refer to this not as an adjudication of this question, but as evidence that the previous decisions in the cases of *Marbury vs. Brooks*, 7 Wheat., 556, and *Brooks vs. Marbury*, 11 Wheat., 78, were not then understood by the Supreme Court to have gone on the ground that an assignment for the benefit of creditors operated to make either the assignee or the creditors purchasers for a valuable consideration.

Those decisions, however, have since been said to have held that in attacking an assignment for the benefit of creditors, it is always necessary to show fraud on the part of the creditors as well as on the part of the assignor. This construction involves an assumption that those cases also held that the creditors were *purchasers* under the assignment. We think the court plainly distinguished creditors as not purchasers by operation of the statute. In 7 Wheat., 579, Ch. J. Marshall described the assignee as "the agent of Fitzhugh (the assignor) to sell his property and pay his debts in the order prescribed by himself." That case recognized the creditors simply as creditors. Again, in 11 Wheat., 87, *Brooks vs. Marbury*, the same learned judge said: "He is the trustee or agent of Fitzhugh (assignor) to perform an act for him which his situation disabled him from performing in person. This act was entirely consistent with law, as it was to sell his property and *apply the proceeds* to the payment of creditors of a particular description in the first instance, and, afterwards, to creditors generally. His right to give the preference is not questioned, nor is the validity of the consideration, so far as it moved from the creditors, infected with any vicious principle." In speaking of the debt furnishing a consideration, the court was occupied in both of these cases in showing that there was valid con-

sideration for the arrangement to apply "the proceeds to the payment" of the banks. That the banks became *purchasers* of the matters assigned with a view to this payment was an unnecessary hypothesis, and was not indicated by anything said in those cases.

Nevertheless, it is claimed that the Supreme Court has held in a later case that the doctrine of those two cases was that no assignment for the benefit of creditors can be held void on the ground that it was made in fraud of creditors unless creditors appear to be participant in the fraud of the assignor.

In *Emerson vs. Senter*, 118 U. S., 3, the case under review was governed by the construction given to the statute of Arkansas by the courts of that State. The court announced that such must be the law of the case. After referring to the decisions of the Supreme Court of Arkansas, according to which a general assignment for the benefit of creditors could not be held void unless it should appear that the creditors participated in the fraudulent intent of the assignor, Mr. Justice Harlan added, "The rule announced by the Supreme Court of Arkansas is in harmony with the settled doctrines of this court and accords with sound reason. *Marbury vs. Brooks*, 7 Wheat., 556, 577; *Brooks vs. Marbury*, 11 Wheat., 78, 89; *Tompkins vs. Wheeler*, 16 Pet., 106, 118."

The question, how far and in what cases we are bound, as an inferior court, to apply an observation, made in a decision of the Supreme Court, as a controlling authority on the point stated, may be embarrassing. Undoubtedly it is our duty to take the law from that court; but whether we must understand that the Supreme Court intended deliberately to adjudicate the matter stated by it is a different question. According to a long line of decisions, the Supreme Court in reviewing decisions concerning the effect of an assignment for the benefit of creditors, "accepts the conclusions of the highest judicial tribunal of the State as controlling." *Peters vs. Bain*, 133 U. S., 686. By the rule of

that court itself, therefore, the only guide which could be followed in *Emerson vs. Senter* was the decisions of the highest judicial tribunal of Arkansas. What that court intended to determine in the *Brooks* and *Marbury* cases was not presented for adjudication. Nor do we understand that such observations as we have referred to are stated with the purpose of laying down a rule which must be followed by the inferior courts. In view of this distinction, and with the highest respect for every suggestion from the source of this opinion, we are compelled to decline to accept as authoritative the observation that the *Brooks* and *Marbury* cases establish the doctrine, that, in all cases of assignment for the benefit of creditors, it is necessary to show that the preferred creditors participated in the fraudulent intent of the assignor, before the transfer can be held void. In those cases it was distinctly held, in the first place, that preference of certain creditors did not show a fraudulent intent even on the part of the assignor; and it was held, in the second place, that a private *hope* to thereby escape prosecution for a felony did not impair the assignor's right to make the preference, and therefore did not constitute the fraudulent intent which would affect the validity of the transfer. In the next place, the court held that it was only when more than a hope of escape existed; in other words, only when there was an understanding that the assignor should actually escape prosecution, that any fraud of this particular kind could exist. The whole scope of those decisions was that the particular fraud imputed could not exist unilaterally, and could only exist by express or implied contract between the assignor and the creditors. The court was not called upon to decide, and did not decide whether an actual intent on the part of the assignor was sufficient to invalidate the assignment. Having held that a private hope of escape did not constitute a disabling fact on the part of the assignor, the court could not well decide whether an actual fraud on his part alone would be sufficient to avoid his act.

We are of opinion, then, that the Supreme Court has not

decided that the creditors are to be regarded as purchasers for a valuable consideration under an assignment for their benefit, nor that it must appear that they were participant in the fraudulent intent of the assignor in making such assignment. Therefore, being satisfied that the assignment in this case was made with intent on the part of the assignors to defraud the plaintiffs, *we hold that it was void as to them, notwithstanding the preferred creditors were not participant in that fraud.*

ANTHONY LULLEY

vs.

JOHN W. MORGAN.

STOCK WAGERING; GAMBLING; PLEA; AFFIDAVIT OF DEFENCE.

1. The Statute of 9th Anne, Ch. 14, Sec. 1, relating to gaming contracts, is in force in the District of Columbia.
2. A plea to an action on a promissory note, setting up as a defence that the consideration of the note was a wager upon the difference in the rise and fall of stocks, is a good plea in bar, even as against a *bona fide* purchaser of the note without notice. The doctrine announced in *Justh vs. Holliday*, 2 Mack. 346, approved.
3. If an affidavit of defence under the 73d rule, as a whole sets up a sufficient defence to the action, an obscurity of statement in particular parts will merely have the effect to condemn such particular statements as of doubtful meaning, and will not invalidate the affidavit.

At Law. No. 28,758. Decided October 17, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by the defendant from a judgment for the plaintiff for want of a sufficient affidavit of defence. *Reversed.*

The facts are stated in the opinion.

Mr. J. J. JOHNSON for defendant (appellant).

Mr. H. E. DAVIS for plaintiff (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This case involves the construction of the seventy-third rule of this court.

The plaintiff sued the defendant on two promissory notes, one dated 13th December, 1887, for \$360.10, payable sixty days after date, with interest at 8 per cent.; and the other dated 8th of March, 1888, for \$21.38, payable thirty days after date, with interest at 6 per cent., each payable to the order of E. Brand, and endorsed by him in blank.

The declaration contains the proper averments; and filed with it is the affidavit of the plaintiff which is quite sufficient under the provisions of the seventy-third rule. The plaintiff, by virtue of that rule, in view of these facts, became entitled to claim a judgment by default, unless it appeared, as provided by the rule, that the defendant had filed, "along with his plea, if in bar, an affidavit of defence, denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating, also, in precise and distinct terms, the grounds of his defence, which would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

The defendant presented four pleas, accompanied by an affidavit,* and the question now is, whether these pleas and the affidavit were a sufficient gratification of the rule.

* DEFENDANT'S AFFIDAVIT. District of Columbia, to wit: John W. Morgan being duly sworn, deposes and says that he is the defendant in the above entitled cause, and that he knows the plaintiff; that in October and November, 1886, Charles T. Havener and William H. Barnes, under the firm name of C. T. Havener & Co., were engaged in business in the City of Washington, District of Columbia, as stock brokers exclusively. Mr. E. Brand, the payee in the notes sued on in the above entitled action, was acting as the dealer in the transactions of stocks on margins for me, with the firm of said Havener & Co. at a margin of one per cent. It was the express and positive agreement between said Brand, Havener & Co., and myself that no stocks were to be purchased by them for me, and none were to be delivered to me nor to any one for me, and none were ever delivered to me. It was the intention and understanding that no stocks would or should be delivered to me at any time, because I was operating under a wagering contract, that is upon the differences in the rise and fall of the stocks alone. About December 20, 1886, said firm claimed that they had put up margins for me to the amount of \$850,

This rule has been before the court in special term for construction scores of times, and it has been repeatedly before this court.

The pleas were:

First. Not indebted.

Second. Non assumpsit.

Third. That there was no valid consideration for the making and giving of the notes—and

“Fourth. And for a further plea, the said defendant says that the consideration mentioned as given, if any, was illegal, against public policy, and void; that said notes were given for gambling transactions in stocks, and not for *bona fide* purchases of stock, or otherwise; that no stocks were ever intended to be delivered to this defendant, under said transactions in stocks, and none were delivered to this defendant; but, that the consideration of which said notes was made, were wagers upon the differences in the rise and fall of stocks, and no other or different consideration passed for

and lost it all in the fall of stocks and demanded that sum of me in consequence thereof. Said firm never rendered me any account current of their marginal transactions, to see the losses and profits for which they claimed. I believed at that time and I believe now, that I never owed them said sum claimed by them. Mr. Brand who made the “deals,” and on behalf of Havener & Co., called to see me in regard to paying said firm the sum claimed. I declined at first to entertain the matter, saying I did not owe it. But, finally, Mr. Brand said if I would give notes for said amount, that I would never have to pay them. Then, under such circumstances, I made two notes for said sum, payable in 60 and 90 days, to the order of said Brand, and he endorsed them and handed them to Havener & Co. When the notes became due, I refused to pay them, or any part of them, saying I did not owe them, as the notes were given without any consideration and they knew it. Mr. Brand, however, said he would pay a curtail on said notes himself. I again renewed the notes by making other notes for a less amounts, to the order of said Brand. One of said renewals is the note sued on in this suit. The note for which the note in question is a renewal is dated August 13, 1887, for \$350, payable in 60 days, at 8 per cent. interest, to the order of said Brand, and was by him endorsed and given to said Barnes, and by said Barnes endorsed. When this last mentioned note became due said Barnes called to see me with reference to its payment, saying that he was the owner and holder of said note. I became very indignant telling him I did not owe it and would not pay it, as he knew there never was any consideration given for the making of said note. However, in a talk between Barnes, Brand, and myself, Brand,

the giving of said notes, and the plaintiff well knew at the time of the making of said notes by this defendant, what the consideration thereof was."

The first inquiry is, whether the last plea presents a defence, which, if true, would defeat the plaintiff's action.

Unquestionably it does. The statute of 9th Anne, Chap. 14, section 1, provides that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, the consideration of which is money won at cards, or other games (describing many of them) "shall be utterly void, frustrate and of none effect."

In England this statute was held to invalidate such instruments in whose hands soever they might be, upon the ground that the words of the statute are peremptory: the instruments shall be "null and void, frustrate and of no effect." It would, of course, defeat the whole statute if the mere trick of an assignment by the payee to a third party would have the effect of making them valid. They stand

again on his own part and not on my behalf, paid some curtailment on said note when I again made another note in renewal for that note, and for a less sum, to the order of said Brand; he put his name on the back of said note, and delivered the note to said Barnes. The note was made and delivered for Havener & Co., and for no one else. I heard nothing more of or about said note until it became due, when the plaintiff called to see me to know if I was going to pay the note. I at once told him I would not pay it, as the note was without consideration, and all the parties knew it, and that Barnes, who was representing him knew that no consideration ever was given for the making of the note. The plaintiff was a frequenter of Havener & Co.'s place of business, as I had often seen him there, and from his acts, conduct and secrecy with Havener, a member of said firm, I formed the opinion that his business there was private and confidential with the firm. From the secrecy manifested by said plaintiff in transacting his business with the firm, I believe and aver that the note sued on was simply placed into the hands of the plaintiff for the purpose of bringing this suit against me, and that he was not at the time this suit was brought either the owner or holder of said note. I attach hereto the affidavit of Edmund Brand, and make the same a part of this my affidavit.

JOHN W. MORGAN.

Subscribed and sworn to before me this 8th day of September, A. D. 1888.

[SEAL]

S. A. TERRY,
Notary Public.

precisely in the category of notes executed by infants, or by insane persons, or for some purpose forbidden by law or against public policy; in whose hands soever they may be, they are void. 3 Kent Com., 79, 80.

This statute was in force in Maryland, at the cession, and is still in force in this District.

In the case of Gough *vs.* Pratt, Administrator of Kent, 9th Maryland, 533, the defendant had executed a note for a gaming debt, to Sollers, who assigned it to Kent, a *bona fide* purchaser without notice. Kent's administrator brought suit against the maker of the note, but it was held invalid as against the maker, though in the hands of an innocent third party, without notice.

Appended to the opinion in that case is a learned judgment by Chief Justice Taney in the case of Thomas, trustee of Lloyd *vs.* Watson, in which the same point is considered, delivered in the Circuit Court of the United States in Baltimore.

In the case of Sardo *vs.* Fongeres, 3 Cranch C. C., 655, it was decided that money won at billiards in the District was within the purview of the statute.

This being the law as to gaming transactions in general, this court decided in the case of Justh *vs.* Holliday, 2 Mackey, 346, that just such practices as are described in the fourth plea (namely, the purchase by a broker of stocks on margins) were illicit, as within the inhibition of the statute. In that case the suit was against an endorser of a note given by Gen. Custer to settle a large sum alleged to be due for transactions on margins to a New York broker; and we held there could be no recovery. There can, therefore, be no doubt, that this defence was one which, if proved, would defeat the plaintiff's action. But it is not sufficient, as we have seen, that the plea should present a sufficient defence. It must also be supported by a proper affidavit, in the mode required by the rule.

The rule was adopted after 1869, substantially in its present form. It may be as well to refer to a few of the cases

announcing the general principles governing its construction.

In *Bank against Hitz, MacArthur & Mackey*, page 198, Chief Justice Cartter thus narrates its history, the necessity for its enactment, and the propriety of its continuance:

"This rule was adopted in this jurisdiction when we were overwhelmed with a great oppression of business. The calendar in the Circuit Court had run up to a thousand cases or thereabouts. Great delays in judgment occurred; creditors were postponed in their collections to an indefinite time. Defendants naturally resorted to the formal denials of pleading for the purpose of securing the time that the delays of the law gave them.

"We had precedents for this rule in the jurisprudence in nearly every State. The only doubt we entertained was as to our power to make it. It was matter of serious misgiving to some of the members of the court whether it was not a species of legislation, and whether it was not a denial of the citizen's right under the Constitution. It certainly looked very much like the exercise of legislative rather than judicial power. But after mature deliberation, the court adopted it as a rule of practice, and as such it was very generally acquiesced in by the bar. Still, the court had some misgivings about it, until a case went up from here to the Supreme Court to make rules of practice. That court construed the power given by the organic act of this court favorably to the view we had; and now all doubt has been removed by the action of the Supreme Court in a recent case (*Smoot vs. Rittenhouse*), in which this rule has been upheld.

"Such, briefly, is the history of this rule and its office. It is a rule to prevent vexatious delays in the maturing of a judgment where there is no defence, and at the same time to protect the rights of defendants in good faith contesting a claim, for both parties, plaintiffs and defendants, stand upon a common plane, and must be judged without presumption as equals—equals before the law and in their rights.

"Now, what does the rule mean, this being its office? It is couched in very plain language. It says the defendant shall set out his grounds of defence and swear to them. It does not mean a defence in all its details of incident and fact, but the foundation of the defence. That is all. Those grounds ought not to be vague and indefinite. They should have significance and meaning, and should impress the idea of defence upon the court to which they are addressed. It was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea. If that were done, what should we have here? Why, discussion as to the consistency of a witness' story, whether one witness did not contradict another, that the import of an irrelevant fact was one way or the other, and the like. The court, to ascertain whether he had stated the grounds of his defence, would be called upon to weigh and analyze testimony. And the moment we attempt to ascertain from a mass of testimony the resultant facts, we have got before us as large a case as the case itself could be on trial before a jury. A discussion that reviews all the facts and forces that enter into a verdict is not for the court to undertake before it will allow issues to be made up for a jury."

In *Connick vs. Morrison*, 4th Mackey, 497, the court held that an affidavit of defence under the 73d rule is insufficient when it amounts to no more than a change in terms of the plea and does not state any specific defence or give specific warning to the plaintiff of what the defendant means to rely upon for the purpose of defeating the claim.

And in *Kennedy vs. Barker, MacArthur & Mackey*, 340, where it was insisted the affidavit to the plaintiff's declaration was insufficient, the court said:

"The affidavit is involved and inartificial, and while it deserves unfavorable criticism in point of form, we think, upon examination, that it is in substantial compliance with the rule."

It appears then that all that is needed to secure a jury trial to the defendant is that he should, in intelligible terms, sufficiently apprise the plaintiff that he disputes the particular claim sued on, and disclose the grounds of defence he intends to rely on, which must be such as would, if true, be sufficient to defeat the action.

Applying these common sense principles to the construction of the rule, we come to an examination of the affidavit of the defendant.

There can be no doubt the affidavit, in plain terms, denounces the entire original dealings between the defendant and Havener & Company, as gaming transactions. The defendant states he was dealing with Havener & Company, in the business of buying and selling on margins; that Brand, the payee of the note, was agent for the firm, and it was the express and positive agreement between Brand, Havener & Co. and himself, that no stocks were to be purchased by them for him, nor delivered to him nor to any one for him, and none were ever delivered to him, because he was only operating under a wagering contract, upon the differences in the rise and fall of the stocks alone; that about December 20, 1886, the firm claimed they had put up margains for him to the amount of \$850 and lost it all in the fall of stocks, and demanded that sum of him in settlement; that the firm never rendered him any account current of the transactions, to show the losses and profits for which they claimed; that he believed at that time and believes now that he never owed the sum claimed by them; that Brand, "who made the deal," called upon him with regard to settling for the sum of \$850; but he declined at first to entertain the matter, saying he did not owe it: but finally Brand said if he would give notes for the amount he would never have to pay them; that under these circumstances, he made two notes for said sum, payable in 60 and 90 days to the order of Brand, who endorsed them and handed them to Havener & Company; when the notes became due he refused to pay any part of them, insisting he did not owe

them, as they were given without any consideration, as they knew. At Brand's persuasion, however, he again renewed the notes by making others for less amounts, to the order of Brand.

It thus sufficiently appears from the affidavit that the notes sued on are the outcome of the original balance of \$850; so there is no question that he asserts the illicitness of the entire transaction and relies on its illegality as a reason why there should be no recovery against him on the notes sued on.

If the affidavit had stopped here, there could have been no controversy as to its sufficiency, for it would have given the plaintiff a perfectly intelligible statement that the defendant denied the validity of either note upon the grounds indicated.

The alleged obscurity or want of clearness is supposed to appear when he undertakes a more particular description of the circumstances under which the notes sued on were given.

There is certainly a lack of clearness in the statement, that the note of the 13th of August, 1887, for \$350 at sixty days, bearing 8 per cent., was renewed by another note "for a less amounts." This, the plaintiff claims, describes only one note, namely, that for \$360.10 sued on. But that note is not for a less amount than the \$350 note; and it is insisted the use of the article "a" shows the renewal spoken of was of one note only and not of both. But if the word "a" should be omitted the confusion would disappear, and the sentence would then equally embrace both notes.

It is needless, however, to go into an examination of these criticisms, in view of the fact, that the whole dealing, in general terms, was denounced as a gambling transaction in all its aspects, in the first part of the affidavit; even if the particular and unnecessary description of the notes has, by the use of redundant words, created a confusion that otherwise would not have existed.

The only effect of adopting these criticisms would be to

condemn the particular statements as of doubtful meaning; but not as exhibiting such inconsistency with the plain general averments of the affidavit as to leave any doubt in the mind of the plaintiff that the defendant intended to dispute the validity of both notes as the result of a gaming transaction.

As all that results from a reversal of the judgment is to send the parties to a jury, where justice would be done between them, we think we should accept the plain general statement, and reject any supposed blunders as to particulars, as unimportant.

The ruling of the court below is reversed, and the case remanded.

WILLIAM H. MOSES, SURVIVOR, &C.

vs.

CHARLES W. FITTS, ADMINISTRATOR.

DEATH OF COUNSEL; MOTION TO EMPLOY NEW COUNSEL.

When a motion is made to dismiss an appeal because there is no record on which the appeal could be heard, appellant's counsel having died pending the litigation, the motion will not be entertained until notice of a motion is served upon appellant requiring him to employ new counsel.

At Law. No. 30,702. Decided October 17, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a motion to dismiss an appeal from an order overruling a motion for a new trial and a motion in arrest of judgment.

Mr. J. G. BIGELOW for the motion.

In the case of William H. Moses, survivor, &c., against Charles W. Fitts, administrator, a motion is made by the plaintiff to dismiss the defendant's appeal because there is no record whatever on which said appeal could be heard.

We note that Gen. Mussey was counsel of record for the defendant in this case. He is deceased; and we think that the first step, before any other is taken, the party defendant having failed to cause counsel to enter their appearance, would be the filing of the motion, notice of which should be served upon the defendant, requiring him to employ new counsel.

We think this motion to dismiss should not be heard or disposed of until that is done.

WILLIAM H. MOSES, SURVIVOR, &C.

vs.

CHARLES W. FITTS, ADMINISTRATOR, &C.

APPEAL; AUDITOR'S REPORT; JUDGMENT.

An appeal lies from a judgment of the circuit court upon an auditor's report filed pursuant to an order of reference.

At Law. No. 30,702. Decided October 17, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a motion to dismiss appeal from judgment for plaintiff on report of Auditor. *Overruled.*

Mr. J. G. BIGELOW for the motion.

Mr. H. T. TAGGART, *contra.*

The CHIEF JUSTICE delivered the opinion of the Court:

A motion is filed to dismiss this appeal on the ground that no appeal lies from a judgment recovered in the court in special term upon the report of the Auditor filed in that court in accordance with an order of reference under rule 80 of this court. That rule provides that where a verdict is rendered in the court in special term against an administrator, reference may be had to the Auditor for the purpose

of ascertaining the assets; and that the court shall render a judgment for the amount reported by the Auditor.

The assumption of the plaintiff in this motion is that no appeal lies from the judgment rendered upon such report. We think that an appeal lies from a judgment so rendered as from any other judgment rendered by the court in special term. The same law which provides for appeals from judgments recovered in the court in special term generally, affects this case and authorizes an appeal.

The motion will therefore be overruled.

IN RE ESTATE OF OTIS P. CLARKE.

ORPHANS' COURT; APPEAL; DOCKETING CASE.

1. When a party appeals from the Orphans' Court, but fails to prosecute his appeal, the General Term will not entertain a motion to docket the case and dismiss it for want of prosecution.
2. Under such circumstances the appellee should apply to the Orphans' Court to proceed to the settlement of the estate.

Orphans' Court. No. 2,990. Decided October 17, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a motion to dismiss an appeal from the Orphans' Court. *Overruled.*

The facts are stated in the opinion.

Mr. J. G. BIGELOW for the motion.

Mr. R. D. MUSSEY appeared for appellant at the time the appeal was filed, but died before this motion was argued.

The CHIEF JUSTICE delivered the opinion of the Court:

This is an appeal from the Orphans' Court, and a motion is made to docket the case and dismiss it for want of prosecution in this court.

It is not the practice of this court to docket a case when there is no record in this court and nothing to act upon—to order a case to be calendared, and then act upon it as if the record were here. Really, we have nothing to determine this motion by except the statement of counsel and the motion which is filed. If the appellant does not prosecute his appeal, the opposite party may apply to the Orphans' Court to proceed to the settlement of the estate, if the appellant has not filed a supersedeas. It is for the appellee, if he wishes to proceed here, to file the proper papers. There are proceedings that may be taken by the appellee when the appellant fails to prosecute his appeal probably; but we are without a record of what has been done in the Orphans' Court, and must *overrule the present motion*.

HENRY KRAAK

vs.

EVA FRIES.

STATUTE OF FRAUDS; PAROL CONTRACT; AGREEMENT TO SELL; TIME OF PERFORMANCE.

1. A verbal contract for the sale of real estate is within the fourth paragraph of Section 4 of the Statute of Frauds, and is therefore void.
2. A note given to secure the execution of a void agreement is equally void, as without consideration.
3. A parol agreement collateral to a written contract concerning the sale of interests in lands, and not interfering with its terms, is not void under the statute of frauds.
4. When a contract is made for the purchase of real estate by a day named, but not performed on that day, an offer to purchase on a subsequent day is not a sufficient compliance with the contract on the part of the contemplated vendee.

At Law. No. 27,775. Decided October 24, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a motion by the plaintiff for a new trial on a bill of exceptions. *Judgment affirmed.*

The facts are stated in the opinion.

Mr. C. CARLISLE for plaintiff (appellant).

Mr. B. F. LEIGHTON for defendant (appellee).

Mr. Justice HAGNER delivered the opinion of the Court :

This is a suit at law by the plaintiff against the defendant, upon her note dated March 12, 1887, for \$100, payable on demand to the order of Henry Kraak, at the National Bank of Washington, with interest until paid.

The declaration is in the usual form.

The defendant pleaded general issue, and also a plea in set-off, which alleged the plaintiff was indebted to her in a like sum of \$100, which, in the particulars of defence, is described as a check made by the defendant to the order of the plaintiff contemporaneously with the note, for that amount.

At the trial the plaintiff proved the note and rested. Thereupon the defendant testified that on the 12th day of March, 1887, the day the note was given, the plaintiff came to her and asked her to sell him her house and lot, and offered her therefor the sum of \$4,000; that she agreed to accept the offer; and it was then agreed between them that the sale should be consummated on or before the 20th day of March, 1887, and further that the plaintiff and defendant should each deposit with Charles A. James, the cashier of the National Bank of Washington, the sum of \$100 to be forfeited by either party who should fail to perform his part of the contract to the party able and willing to perform it on his or her part; that upon this agreement the defendant executed the note sued on and the plaintiff executed his check for the sum of \$100, and both were then delivered to James, the cashier, to hold in escrow upon the conditions above mentioned; that the contract for the sale of the land was entirely in parol, the only papers signed being the note and the check, neither of which contained any reference to the contract.

The defendant further testified that the plaintiff did not perform his said oral agreement on the 20th day of March, 1887, but made default therein; but that afterwards, about the 29th day of March, the plaintiff offered to perform his contract by taking the real estate and paying the sum of \$4,000.

There the defendant rested.

The plaintiff then gave evidence tending to show that there was no time fixed for the performance of the contract except such as was necessary for an examination of the title; that on the 12th of March the plaintiff and defendant went to the Real Estate Title Company's office, and the plaintiff ordered an abstract of title, which the company agreed to furnish by the 20th of March; that the company did not furnish it until the 27th of March, and thereupon the plaintiff offered to comply with the terms of the agreement by offering on that day to pay for the property, but that the defendant refused to convey the land.

The only other evidence was that of Mr. James, who testified that when the papers were left with him, he heard nothing said with reference to the limitation to the 20th day of March as the date when the contract should be consummated.

Thereupon, upon application of the defendant, the court below directed the jury to find a verdict for the defendant.

The ground of the defence was that the note having been given only as a forfeit for the non-performance of a parol contract respecting the sale of land was, therefore, without consideration and incapable of sustaining a recovery.

The question has been very well argued by counsel on both sides, and being an interesting one, we have given it full attention.

As a matter of course, the verbal contract between the plaintiff and the defendant was distinctly within the 4th paragraph of the section 4, of the Statute of Frauds; and therefore was totally void and incapable of being enforced or taken cognizance of by any court except by decree for

a specific performance upon such proof of part payment as is recognized as sufficient by a court of equity. The note of the defendant was, therefore, given to secure the execution of a void agreement—in other words of no agreement at all; and hence was equally void, as without consideration. We think this position is clear from a proper consideration of the authorities, notwithstanding its apparent conflict with some of those quoted by counsel for the plaintiff. In Browne on the Statute of Frauds, Sec. 134, in illustrating the results of the invalidity of parol contracts for the sale of land, the author says:

“This case, *Carrington vs. Roots*, 2 Mees. & Welsby, 248, affords a very clear exemplification of the general rule which may be here reasserted, that no action can be brought to charge the defendant *in any way* upon a verbal agreement not put in writing according to the statute. And it may be briefly illustrated further. If land be sold at auction or otherwise, and no memorandum made, and the purchaser refuses to take it, no action will lie against him to recover the loss sustained upon a second sale to another party; this could be done, manifestly, only upon the ground that he was originally legally liable to take and pay for the land himself. Nor will a discharge from performing a verbal contract within the statute be a sufficient consideration to support another engagement. No action whatever could have been maintained against the defendant for any breach of that contract. A discharge from it, therefore, is of no use to him. And upon exactly the same principle, an engagement to forfeit a certain sum of money, in case of failing to perform another engagement which, within the Statute of Frauds, could not itself be enforced, is not enforceable by the party to whom it is made.”

“So where the defendant agreed to take up certain notes and receive a conveyance of land which a third party had verbally engaged to give, the defendant's promise was held void for want of consideration.”

This is the principle decided in the case of *Goodrich vs.*

Nickols, 2 Root (Conn.), 498, which seems to be directly applicable to the case under consideration.

To the same effect is the case of *Rice vs. Peet* (15 Johnson, 502). There two parties agreed verbally to exchange their farms, and one of them delivered to the other a note which had been given to him by a third person to be forfeited in case he should not comply with the contract. He failed to comply; whereupon the other party went to the drawer of the note and collected the money. The plaintiff in the case thereupon brought suit for the money thus collected and it was held that he could recover the money. The court after examining other points said:

"There is another ground on which the plaintiff had good right to recover the money received by the defendant on that note. It was received by the defendant without consideration; the contract for the exchange of farms was void by the Statute of Frauds, being by parol only."

The case of *Levy vs. Brush*, 45 N. Y., 589, is a very instructive one. Two parties agreed that one of them should attend an auction and purchase a piece of land which was to be there offered for sale. The person who was to bid it off was to pay for it, and then it was to be held jointly for the two, and the second party was to reimburse the purchaser one-half the money so paid. At the auction he did buy the land, but signed no note of the purchase, and the auctioneer failed to make any memorandum of the transaction, so that the contract of sale was entirely verbal and void under the Statute of Frauds. The purchaser who had thus possessed himself of the land under this agreement refused to make good his contract with the other party, who filed a bill to compel him to receive one-half of the money and convey one-half of the land. The relief was refused upon the ground that the contract of sale of the land at the auction, in the absence of an agreement or memorandum or note thereof, was totally void under the Statute of Frauds and therefore the collateral agreement, so called, to divide the land when bought, was also void and could not be enforced. The court said (p. 594):

"If no valid contract for purchase had been made, the plaintiff would have had no remedy against the defendant, although the failure to make such contract was wholly from the default of the defendant. In other words, an action will not lie by one party against another for the breach of a verbal agreement to unite with him in the purchase of a designated piece of land, the title to be taken by them in common. No purchase having been made, such an agreement would come within the statute, &c."

Again, the court, replying to an argument advanced by counsel for the plaintiff, that the statute cannot be invoked as a shield to protect a party in the perpetration of a fraud, says:

"But no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient to take the case out of the statute, would repeal it. Care must be taken that this is not done, under an idea that as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party, in no legal sense, commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance."

This case is cited with approbation by the Supreme Court in the case of *Howland vs. Blake*, 97 U. S., 628.

The authorities cited by the plaintiff do not impugn this principle. It is true, a parol agreement collateral to a written contract concerning the sale of interests in lands, and not interfering with its terms, is not void under the statute. Such was the case of *Morgan vs. Griffith*, L. R., 6 Exch.,

70, where a landlord who had given a written lease afterwards agreed with the tenant that he would keep down the rabbits that were overrunning the crops. Upon failure to do so, the tenant brought suit upon the collateral agreement, and it was held it might be established by parol.

This and a similar case, *Erskine vs. Adeane*, 8 Chancery Appeals Cases, 756, and many others to the same effect, were relied on in the case of *Raub vs. Barbour*, 6 Mackey, 245, where it was decided that a lessee under a written lease which gave him power to assign his term, might be held answerable under a contemporaneous verbal promise to divide with the lessor whatever profits he might make by the assignment. But such recognized collateral verbal agreements presuppose the existence of valid existing contracts, to which they are suppletory. If the principal agreement is void and not capable of being enforced, it is not easy to see how a penalty can lawfully be enforced for its non-performance. If there are any cases apparently to the contrary, they must have been governed by some other principle.

An additional reason why the plaintiff could not recover is that the contract was conditional. Payment was to be made and deed given on the 20th of March, on which day the defendant was ready to comply with the terms of the contract; but the plaintiff failed to do so. The excuse that he offered to comply on the 27th or 29th of March, was no more a legal performance by him of his part of the agreement than an offer to do so on the 29th of April would have been.

We think the judgment below correct, and it is affirmed.

IN THE MATTER OF WILLIAM A. HOEVELER AND
THOMAS J. MCTIGHE FOR THE REISSUE
OF LETTERS PATENT No. 312,470.

PATENT OFFICE PRACTICE; RES ADJUDICATA; REVIEWING ACTION
OF PREDECESSOR IN OFFICE.

1. It *seems* that where a matter is intrusted to the adjudication of the head of a department or an executive officer of the government, to be determined by him, his decision cannot be re-opened, set aside, and a different result ordered by his successor, except for fraud, clerical error apparent on the face of the proceedings, or newly discovered evidence presented within a reasonable time and under such circumstances as would be a sufficient cause for granting a new trial in a court of law.
2. The decision of an Assistant Commissioner of Patents is of the same dignity and authority as that of a Commissioner.
3. When a Commissioner of Patents has once passed upon the merits of an application, the same matter cannot be again enquired into by a subsequent Commissioner, notwithstanding the former Commissioner may have directed that the case be called to his personal attention before the patent shall issue.

Patent Appeals. No. 99. Decided October 24, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal from a decision of the Commissioner of Patents in refusing to allow patent to issue. *Reversed.*

The facts are stated in the opinion.

Mr. PHILIP MAURO for appellants.

Mr. W. S. CASE for Patent Office (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

On the 17th day of February, 1885, Letters Patent No. 312,470 were issued to William A. Hoeveler and Thomas J. McTighe. On the 28th day of September, 1885, the patentees filed this application for a reissue. The invention is for a system for conveying and distributing natural gas.

The applicants for reissue claimed and still claim that through the mistake and misunderstanding of their solicitors the patent issued without including a valuable feature of the invention, and the application for reissue is to correct the claimed mistake, and having been made within eight months after the issuing of the original patent it is claimed no laches can be imputed to them.

The reissue was refused by the primary examiner on the ground that the applicants had abandoned their right to the subject matter of the claims sought to be obtained by the reissue. The examiner found (1) that said claims were in substance the same as a claim made in the original application, and which upon rejection was erased by the solicitor in charge of the case; and (2) that such act by the agent amounts to an abandonment by the principal of the subject matter of the claim so erased. Issue was taken on both these propositions, and the matter carried by appeal to the Commissioner of Patents.

The result of the appeal to the Commissioner was, that the adverse decision of the lower tribunals was overruled and it was decided that the claim of the patentees, that by mistake of their solicitors a material patentable claim had been omitted from the patent, was true, and the appellants were declared to be lawfully entitled to the reissue as prayed.

This decision was made April 10, 1888, by Assistant Commissioner Vance, and appellants claim was a final decision not subject to review by the successor of the Commissioner who made it. It is claimed that the appellants are yet under this decision entitled to a patent, and that one would have issued to them at once but that an interference was found to exist with other claimants of the same invention, which interference was hotly contested and was finally decided by Commissioner Mitchell, the successor of the Commissioner who decided Hoeveler and McTighe's appeal on the 15th day of July, 1890, in favor of Hoeveler and McTighe.

It is claimed by the appellants that it then became the duty of Commissioner Mitchell, to reissue the patent to them,

instead of which he, on March 26, 1891, *sua sponte*, opened the decision of his predecessor before mentioned as rendered April 10, 1888, *and upon the same state of facts* but with a different view of the law reversed the same.

From the latter decision, Hoeveler and McTighe appealed to this court. The appellants contend that Commissioner Mitchell could not lawfully reopen the final decision of his predecessor, Acting Commissioner Vance, set it aside and order a different result upon the same state of law and facts.

It appears from the record that when the interferences were declared the adversaries of Hoeveler and McTighe moved to dissolve the same on the ground that the latter were estopped to claim the subject matter involved. This raised again the whole question previously passed upon by the Commissioner in his decision of April 10, 1888.

These motions were referred by the examiner to Commissioner Hall, and it is said, were elaborately argued before him.

On reconsideration of the whole matter, Commissioner Hall seems to have affirmed the decision of the Assistant Commissioner of April 10, 1888, on the 28th day of September, 1888, in these words:

"The examiner is instructed to proceed in considering the application of Hoeveler and McTighe in conformity with the decision of the Assistant Commissioner. Should Hoeveler and McTighe finally prevail in these interferences, the examiner is directed to call the attention of the Commissioner in person to the application before passing the same to issue."

From this paper it appears that Commissioner Hall examined personally the grounds of the decision of the Assistant Commissioner, for the purpose of ascertaining, as the law and rules require before declaration of an interference, (Rule 95) whether the parties had the right to make the claims involved; and it further seems that he affirmed the decision and directed that it be followed. It also appears that for some purpose which he did not deem necessary to

express, he thought it proper and expedient to direct that his attention be called to the application in the event the interferences should be decided in favor of Hoeveler and McTighe before issuing a patent. Just what may have been the purpose in giving the latter direction must remain a matter of conjecture.

The appellants say it can only mean that Commissioner Hall desired to keep his eye on the case so that he might see that the subsequent proceedings relating to interferences were correct, while Commissioner Mitchell seems to have construed it to mean an intention on the part of Hall to reserve the right to reconsider the decision of Assistant Commissioner Vance and as an authority to him (Mitchell) to do so as Hall's successor.

Rule 95 of the Patent Office is as follows:

"Before the declaration of interference all preliminary questions must be settled by the primary examiner, and the issue must be clearly defined, the invention which is to form the subject of the controversy must be decided to be patentable, and the claims of the respective parties must be put in such condition that they will not require alteration after the interference shall have been finally decided, unless the testimony adduced upon the trial shall necessitate or justify such change."

Indeed, it does not seem to be contended that Assistant Commissioner Vance had not full authority to make the decision he did, but it is contended by counsel for the appellee that his decision was wrong, and that Commissioner Mitchell had the power to open, review and reverse it.

We have thus presented to us the question as to the power of an executive officer of one administration to reverse a decision of his predecessor of a former administration.

It seems to be well settled that where a matter is intrusted to the adjudication of the head of a department or an executive officer of the government, to be determined by him, his decision cannot be reopened, set aside, and a different result ordered by his successor, except for fraud, clerical

error apparent on the face of the proceedings, or newly discovered evidence presented within a reasonable time and under such circumstances as would be a sufficient cause for granting a new trial in a court of law.

This doctrine has been maintained by numerous opinions of the Attorneys General.

Mr. Wirt, in an opinion given to the Secretary of the Navy in 1825, said:

"Each administration has already as much as it can do in the current business which belongs to it; but if to this is to be superadded the burden of reviewing the acts of preceding administrations, in which individuals may suppose themselves to have been aggrieved, it is manifest that the burden will become immediately insupportable. Hence, I have understood it to be a rule prescribed to itself by each administration to consider the acts of its predecessors conclusive as far as the executive is concerned." 2 Op. Atty. Gen., 9.

Attorney General Taney, in 1831, declared that a final decision, upon a knowledge of all the facts, made by an officer authorized to decide on claims against the government, was binding upon and not liable to be opened and reversed by his successor in office, *Id.*, 465, and the principle was approved by Attorney General Nelson in 1844, 4 *Id.*, 341, and Attorney General Toucey in 1848, 5 *Id.*, 30.

Mr. Reverdy Johnson, in 1850, ruled upon the authority of the case of the United States *vs.* Bank of the Metropolis, 15 Peters, 401, that the decision of the Secretary of the Treasury, while the Land Office belonged to his Department, was *res judicata*, and "whether right or wrong," could not be overruled by his successor, the Secretary of the Interior. 5 Op. Atty. Gen., 244.

The same Attorney General, in another opinion, 5 *Id.*, 124, said:

"If the decision pronounced is *quasi* judicial; if the head of a department is by law made the judge of the claim, to

decide upon its existence and its extent, and his decision is erroneous, it is equally conclusive, whether this error be from a misconception of the facts or the law."

To this effect Attorney General Johnson again laid down the law in Sibbald's case, 5 Id., 177, when he said:

"The questions submitted to your predecessor by the resolution of 1846 were combined questions of law and fact. Over each his jurisdiction was made complete and exclusive * * * It necessarily follows that his decision upon all matters of fact connected with the claim is as final as it is upon all questions of law involved in it. There is no power in his successor to review his decision upon the grounds of error as to the one or the other. It has more than once been judicially held that decisions of this character are final. The safety of the Government and the desired certainty of the law alike establish the soundness of the doctrine. Errors in calculation may be corrected, but no errors of decision upon controverted facts. As to these the matter is past relief. The decision stands as the law of the case, ever binding and conclusive, until Congress thinks proper, by law, to reopen it. I answer your first question, therefore, by saying that it is not your right, and, of course, not your duty, to review the decision of your predecessor upon the ground assumed in the inquiry."

To the same effect are the opinions of Mr. Black, 9 Id., 34; Mr. Bates, 10 Id., 225; Mr. Stanbery, 12 Id., 169, 356; Mr. Hoar, 13 Id., 33, 326; Mr. Akerman, 13 Id., 387; Mr. Bristow, 13 Id., 456; Mr. Williams, 14 Id., 275; Mr. Devens, 15 Id., 316, 425; 16 Id., 489.

The rule is stated by Attorney General Devens in the following language:

"According to a well settled rule of administrative law, often mentioned with approval by the Attorneys General, the decision made by the former secretary in 1875 must be regarded as binding upon his successor, the present secretary, unless it shall appear to be founded upon a mistake of fact, arising from error of calculation, or unless new and

material evidence since discovered is produced, which, had the same been before the department when the decision was made, would have led to a different result. Except under the circumstances just stated, viz., of mistake arising from error of calculation, or the production of new and material evidence, the present secretary would not be at liberty to disturb or review the decision of his predecessor." 15 Op. Atty. Gen., 425.

The Court of Claims has often affirmed the same doctrine, Lavalette's case, 1 Ct. Cls. R., 149; McKee's case, 12 Id., 504; Hodge's case, 20 Id., 352; State of Illinois' case, 20 Id., 342; Day's case, 21 Id., 264; Rollin and Presbrey *vs.* U. S., 23 Id., 123.

Chief Justice Richardson, in the case of Rollin and Presbrey *vs.* U. S., 23 Ct. Cls., 123, stated the doctrine as follows:

"It has long been held in the Executive Departments that when a claim or controversy between the United States and individuals therein pending has once been fully considered and final action and determination had thereon by an executive officer having jurisdiction of the same, it cannot be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time, and under such circumstances as would be a sufficient cause for granting a new trial in a court of law."

The late Senator David Davis in reporting the opinion of the Judiciary Committee of the Senate uses the following language (see Jackson's case, *supra*):

"The principle which has been so often decided, that the final decision of a matter before the head of a department is binding upon his successor when no material testimony is afterwards discovered and produced is now entitled to be regarded as a settled rule of administrative law."

In the United States *vs.* The Bank of the Metropolis, 15 Peters, 390, the third clause of the syllabus is as follows:

"The head of a department has not a right to review the decision of his predecessor, allowing a credit, except to correct some error of calculation; if he is of the opinion that the allowance was wrongful, he must have a suit brought." In the same case, pages 400-401, Mr. Justice Wayne delivering the opinion of the court says: "The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances, which the said Postmaster General was not legally authorized to allow, then it was the duty of the present Postmaster General to allow such item of credit. The successor of Mr. Barry had the same power, and no more than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of the department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

See, also, *United States vs. Stone*, 2 Wallace, 535, where Mr. Justice Grier says: "The patent is but the evidence of the grant and the officer acts ministerially and not judicially. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor."

It appears in the case of *Stephen Hall* (7 O. G., 559, and 8 Id., 46) that Commissioner Leggett in his return to the rule as cause for his action, said: "First, my predecessor had evidently deliberately decided that a patent could not be granted, and under the practice in all the departments

which, if not statutory, has the force of law, I am not at liberty to review his decision." And it further appears that Commissioner Duell, the successor of Leggett, said with reference to the rule referred to by his predecessor, "I acknowledge the force of the rule in those cases where a final adjudication upon all the facts has been had."

The position of the counsel who filed a brief for the Patent Office, in relation to the authority of Commissioner Mitchell to reopen and reverse the decision of Assistant Commissioner Vance, is thus stated in his brief.

"But the appellants urge that the Commissioner erred and exceeded his discretionary powers in rehearing the case and refusing this reissue application when it had already been favorably acted upon by his immediate predecessor in office.

"The record in the case shows that upon the original hearing for a reissue, the then Assistant Commissioner Vance decided in favor of the applicants.

"That Commissioner Mitchell after his accession to office, reopened the case, and upon hearing, reversed his predecessor's action, and refused the patent.

"It is difficult to see upon what grounds the appellants can successfully urge this point here.

"Cases in the Patent Office are heard by the Commissioner of Patents, and his individuality is not a question of moment in an appeal before this court.

"Constructively the Commissioner of Patents is always the same person.

"If for good and sufficient cause, in his opinion, the interests of the public demand that a case shall be reheard, it is within the powers conferred upon him by statute to order a rehearing, and if he finds it necessary, reverse the earlier decision.

"It appears from the record in this case that there was sufficient cause.

"The action of Commissioner Hall—who was the immediate superior of Mr. Vance—in ordering that the

case be submitted to him in person before it passed to issue, was, in Mr. Mitchell's opinion, binding upon himself as Mr. Hall's successor. It is not necessary to go into that matter here.

"The jurisdiction conferred upon this court is to revise such action of the Commissioner, affecting the merits of the invention in controversy, as the court shall deem necessary upon a proper hearing.

"We respectfully submit that matters of Patent-office practice, and questions arising thereunder which have no bearing on the merits of the case appealed are clearly not reviewable by this court.

"The sole question is upon the merits of the appellant's case, and upon the justice or the injustice of the Commissioner's decision in refusing them a patent in view of the matters of law and fact which the record discloses."

Neither statute or other authority is cited in support of the position which counsel assumes, viz.: that Commissioner Mitchell had the rightful power to reopen and reverse the decision of Assistant Commissioner Vance, nor are we furnished with reasons or arguments in favor of such a power beyond what appears in the foregoing extract from the brief.

It appears to us that the authorities before cited are applicable to the question of the power of Commissioner Mitchell to make this order of reversal. The fact that the original order in favor of reissue was made by the then Assistant Commissioner does not affect the question, for it appears that the decision of the Assistant Commissioner is of the same dignity and authority as the Commissioner, no appeal lying from the former to the latter and no supervisory power over the decisions of the assistant is invested in the Commissioner more than over his own. In other words the decision of the assistant is that of the Commissioner.

Whatever may be supposed to have been the purpose of Commissioner Hall in his order to the examiner of Sep-

tember 28, 1888 to call his attention to the case before issue, it is clear to us, that he could not thereby invest himself or his successor with a power to rehear the question of the right of Hoeveler and McTighe to a reissue which the law would not otherwise confer.

Aside from the principle of law which we have considered applicable to all of the departments of the government as to the power of an officer to set aside or annul the action of his predecessor, rule 139 of the Rules of Practice in the Patent Office is as follows: "139. Cases which have been deliberately decided by one Commissioner will not be reconsidered by his successor except in accordance with the principles which govern the granting of new trials."

Inasmuch as it is not claimed that Commissioner Mitchell had facts before him which were not before Assistant Commissioner Vance, nor that there was not a full hearing upon the facts and law, before the latter, nor is it claimed that there was fraud practised in procuring the decision by Vance, we cannot perceive what grounds were before Commissioner Mitchell requiring him *sua sponte* to review and reverse the former decision. None are disclosed by the record. It is intimated by counsel for the appellee that upon appeal this court cannot consider the question of the power of Commissioner Mitchell to reverse his predecessor because our power under the law "is to revise such action of the Commissioner affecting the merits of the invention in controversy, as the court shall deem necessary upon a proper hearing." Before Commissioner Mitchell could decide that the appellants were not entitled to a reissue he was compelled to set aside the order of Commissioner Vance, both of which things he did in one order, which is the order appealed from. Without reversing the order of Vance he had but one duty which he could perform, and that was to reissue the patent. Without doing so he proceeded without authority of law to remove the obligation to reissue resting on him by reversing the decision that the invention was patentable and meritorious and then deciding that it was not

patentable or meritorious; and yet counsel gravely suggests that the order of reversal does not affect the merits of the invention. We think further comment on this point unnecessary. We may remark, however, that the statute which provides for an appeal to this court from the decision of the Commissioner limits our power of revision to the "points set forth in the reasons of appeal." The second point in appellants' reasons of appeal is that Commissioner Mitchell erred in reopening and reversing the final decision of his predecessor. We are unanimously of the opinion that the record does not disclose any ground sufficient in law to authorize Commissioner Mitchell to make the order of March 26, 1891, reversing the order of Assistant Commissioner Vance of April 10, 1888, and thereupon deciding that the appellants were not entitled to a reissue of the patent. We therefore order that the said order of Commissioner Mitchell of March 26, 1891, be set aside and the said order and decision of Assistant Commissioner Vance be restored in full force and effect and the case remanded to the Commissioner of Patents for further proceedings.

Counsel have presented us with an elaborate argument with citations to numerous authorities both *pro* and *con* upon the questions involved in the hearing before Assistant Commissioner Vance which ultimated in his decision of April 10, 1888, but inasmuch as that order and decision is not before us on appeal for revision nor in any way except as we have already indicated, we are not authorized to express any opinion, nor would it be appropriate that we should, upon the merits of the controversy involved in that decision.

THE UNITED STATES EX REL.
ELIZABETH TRASK

vs.

JOHN WANAMAKER, POSTMASTER GENERAL.

MANDAMUS; POSTMASTERS; READJUSTMENT OF SALARIES.

1. In the absence of clear indication to the contrary, every statute must be construed to be prospective in its operation.
2. The act of Congress of June 12, 1866, (14 Stat. p. 60), relating to postmasters' salaries, merely defines the occasion which shall make imperative a readjustment of a salary to be paid after that date. It does not affect salaries allowed for expired terms.
3. The act of Congress of March 3, 1883, (22 Stat. p. 487), for the first time, provided for readjustment of postmasters' salaries for terms which had expired, but this act refers only to a readjustment of salaries under the act of 1866, which was prospective in its operation. It did not affect salaries which had theretofore been readjusted.

At Law. No. 33,047. Decided October 24, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a petition for a writ of mandamus, certified to General Term to be heard in the first instance. *Writ denied.*

The facts are stated in the opinion.

Mr. HARVEY SPALDING for petitioner.

Mr. C. C. COLE for Postmaster General.

Mr. Justice JAMES delivered the opinion of the Court:

This is a petition for a writ of mandamus. The relator's petition states substantially the following case:

She became postmaster at Emporia, Kansas, on October 1, 1864, and so continued to and including June 30, 1870. During the whole of the biennial term ending June 30, 1866, the returns of the office paid to the United States amounted to \$1,567.98, the commissions on which, under the act of

June 22, 1854, if allowed, would have amounted to \$863.99. The salary allowed for the seven quarters of this period, during which the relator was postmaster, was \$580.

During the biennial term ending June 30, 1868, the returns of the office amounted to \$2,230.73, besides \$73 box rents, commissions upon which, under the said act of 1854, if allowed, would amount to \$1,270.37, while relator was paid a salary, for the same period, of \$800.

For the biennial term ending June 30, 1870, the returns of the office amounted to \$6,312.53, besides \$230 box rents, upon which commissions under said act of 1854, if allowed, would amount to \$3,139.33; while the relator was paid a salary, for the same biennial term, of \$1,580.

The petitioner thereupon claims that it became the duty of the Postmaster General, under section 8 of the act of June 12, 1866, to readjust said salary at the end of each biennial term, because the same was ten per cent. less than it would have been in commissions under said act of 1854, and to allow the difference between the salary paid and said commissions.

The relator further sets forth that, on June 9, 1883, and February 17, 1884, the Postmasters General of those dates issued orders in which they construed the statutes relating to readjustment of salaries; that they caused to be entered upon the forms described in those orders, the sum of \$1,567.98, as the amount of the postal receipts at the relator's postoffice during the biennial term ending June 30, 1866, and the salary of said office, for the whole of said term, computed on the basis of the act of 1854, as \$863.99, and the relator's proportion thereof, for seven quarters of that term, as \$755.99; that they caused to be entered on said forms the sum of \$2,230.73, as the amount of relator's postal receipts for the biennial term ending June 30, 1868, and the sum of \$1,270.37, as relator's salary for the same term; and the sum of \$6,312.53 as the amount of relator's postal receipts for the biennial term ending June 30, 1870, and the sum of \$3,139.83, as the salary of the relator for the same

term; also that the Postmaster General prepared and transmitted to the Committee on Post Offices and Post Roads a statement of the total amount of the relator's readjusted salary, due and unpaid, for the whole time between October 1, 1864, and June 30, 1870, showing the amount so due the relator to be \$2,175.57, but afterwards withdrew that statement, and an error therein was corrected, and an entry was made showing the correct amount due the relator to be \$2,206.19.

The relator states that the Postmaster General has refused to report to the auditor for the Post Office Department, for credit in the relator's account, the amount found due upon said statement, and concludes with the following prayer:

"The relator therefore prays that a writ of mandamus may issue from this honorable court addressed to John Wanamaker, Postmaster General, commanding him to report to the Auditor of the Treasury for the Post Office Department, that upon an examination of the relator's quarterly returns as postmaster at Emporia, Kansas, during her terms of service between October 1, 1864, and June 30, 1870, and a recomputation of her salary as required by section 8 of the act of June 12, 1886, and the act of March 3, 1883, it is found that the additional salary \$2,206.19 is due her, of which she is entitled to be credited in her account."

To this petition the respondent demurred. The case was certified to this court, to be heard here in the first instance, and a rule to show cause was issued.

In order to determine the validity of the relator's claim, we must consider the acts of June 22, 1854, of July 1, 1864, of June 12, 1866, and of March 3, 1883.

The act of June 22, 1854, provided that postmasters should be compensated by commissions on the amount of postal receipts at their respective postoffices, varying in percentage according to the extent of the receipts. The act of July 1, 1864, established five classes of postmasters. To the first class were assigned those whose salaries, as determined by the rule laid down in another part of the act, should be not

less than \$3,000 nor more than \$4,000; to the second those whose salaries should be not less than \$2,000 nor more than \$3,000; to the third, those whose salaries should be not less than \$1,000 nor more than \$2,000; to the fourth, those whose salaries should be not less than \$100 nor more than \$1,000; and to the fifth, those whose salaries should be less than \$100. The rule by which the salary of a particular postmaster should be determined was provided as follows: "To offices of the first, second, and third classes shall be assigned salaries, in even hundreds of dollars, as near as practically in amount the same as, but not exceeding the average compensation of the postmasters thereof for the two years next preceding; and the offices of the fourth class *shall be assigned severally salaries, in even tens of dollars, as near as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceding,*" etc.

The time when the salary system shall take effect was provided by the 3d section of the act as follows: "Salaries of the first, second and third classes should be adjusted to take effect on the first day of July, 1864, and of the fourth and fifth classes at the same time, or at the commencement of a quarter as nearly as practicable thereafter."

The next preceding section (2) provided the readjustment of salaries in the following words:

"The Postmaster General shall review once in two years and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, *on the basis of the preceding section* (namely, Sec. 1) the salary assigned by him to any office; but any change made in such salary *shall not take effect until the first day of the quarter next following such order*, and all orders made assigning or changing salaries shall be made in writing and in his journal and notified to the Auditor of the Post Office Department."

The effect of sections 2 and 3 was that the biennial terms should date from July 1, 1864. By this reference to "the basis of the preceding section," (namely, section 2) it was required that the readjusted salary should be "as near as

practicable in amount the same as, but not exceeding," the average compensation, by commission on postal receipts, for the two years next preceding the order of readjustment. For example, in case of readjustment of the salary which had been allowed for the term ending June 30, 1866, the postal receipts for that term would be the basis of computation, and then the salary so ascertained would, as provided by section 2, apply to the term ending June 30, 1868.

We come now to the statute on which chiefly the relator's claim is founded by her. Section 8 of the act of June 12, 1866, enacted that the second section of the act of 1864 should be amended by adding the following words: "Provided, that when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is 10 per centum less than it would be on a basis of commission under the act of 1854, fixing compensation, the Postmaster General shall review and readjust under the provisions of said section." This, of course, meant the provisions of section 2 of the act of July 1, 1864, which referred to section 1 of the same act.

The relator construes this amendment as intending that, whenever a deficiency of 10 per cent. is found to have occurred in an allowance of salary, that deficiency shall be made up to him as further compensation for the past biennial term in which the deficiency was developed. Her petition contains the following allegation, or rather claim: "That it became the duty of the Postmaster General, under section 8, act June 12, 1866, to readjust said salary at the end of each biennial term, because the said salary was 10 per cent. less than it would have been under said act of 1854, *and to allow her the difference* between the salary paid and said commissions." We understand the relator's contention to be, that this process of supplying the deficiency is to be applied to the biennial terms from June 30, 1864, to June 30, 1870.

We do not so construe the act of 1866. We hold that it merely defines the occasion which shall make imperative a readjustment of the salary to be paid after that date. From

that time the occasion for readjustment was to be the ascertained fact that the salary for the biennial term just ended had been 10 per cent. less than compensation by commissions would have been. In the absence of clear indications to the contrary, every statute is prospective, and this amendment shows as little indication of a contrary intent as did the section which it amended. It is to be observed that this act was passed nearly three weeks before the biennial readjustment of June 30 was to be made. It determined, therefore, the occasion, the state of facts, which should require a readjustment of salary for the biennial term from June 30, 1866, to June 30, 1868, and for succeeding biennial terms. The basis of readjustment remained meantime just what it had been before. In express terms the act of 1866 declared that the readjustment, in these cases of 10 per cent. of difference between the allowed salary and the commissions standard, should be made under the provisions of section 2 of the act of July 1, 1864; and one of those provisions was, that the readjustment should apply only to the salary for the term next following the order of readjustment. The only effect, therefore, of the amendment was to determine the occasion or state of facts which should justify any readjustment. The important point, however, is, that the act of 1866 was a strictly prospective statute, and had reference only to the salaries to be allowed to the incumbents of the several postoffices after that time. It did not intend to operate on salaries which had been allowed for terms which had expired.

We have next to consider the effect of the act of March 3, 1883. That statute was in the following words: "That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and *late postmasters* of the third, fourth and fifth classes under the classification provided in the act of July 1, 1864, whose salaries have not heretofore been readjusted under the terms of section 8 of the act of June 12, 1866, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster

General, or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was 10 per centum less than it would have been upon the basis of commissions under the act of 1854; such readjustment to be made in accordance with the mode presented in section 8 of the act of June 12, 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business returns were made."

In this statute Congress, for the first time, provided for readjustment of salaries for terms which had expired; and in this proceeding the cases of *late* as well as incumbent postmasters were to be included. But it is to be observed that this act refers only to a readjustment of salaries under the act of 1866. We think it is clear that it was not intended to operate upon a salary for any biennial term not included in the operation of that act; and we have already held that the act of 1866 was only prospective. The act of 1883 did not propose to alter the scope of the act of 1866; it proposed only to enforce its application to salaries which had not theretofore been readjusted. It follows that salaries for the term from June 30, 1864, to June 30, 1866, could not be readjusted under this statute.

The prayer, therefore, for a writ of commanding the Postmaster-General, "upon an examination of the relator's returns *during her terms of service between October 1, 1864, and June 30, 1870*, to report to the Auditor of the Treasury for the Post Office Department that it is found that the additional salary \$2,206.29 is due her, for which she is entitled to be credited in her account," cannot be granted.

Some other questions were discussed at the argument, but it is unnecessary to decide them on this demurrer.

The writ is denied.

NOTE.—This case went to the Supreme Court of the United States on writ of error, and was dismissed for want of jurisdiction. (147 U. S., 149).—REPORTERS.

LEWIS MCKENZIE

v/s.

ALICE E. UNDERWOOD.

BOND; COUNSEL FEES; DAMAGES.

When one person gives another a bond to save him harmless from all costs and damages to be sustained by reason of his becoming surety on another bond, and such other person is obliged to pay counsel fees in defending an action against him on the latter bond, such counsel fees are recoverable in an action on the former bond.

In Equity. No. 10,165. Decided October 24, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

The complainant's cause of action was based upon a bond of indemnity to save him harmless from all costs and damages which he should suffer in consequence of his becoming a surety at the request of the obligors in the indemnifying bond. The bill alleges that he had suffered costs and damages in consequence of his becoming such surety, and states that the costs and damages consist of moneys paid out by him in defence of an action on the official bond upon which he was such surety, the greater part of the moneys so paid out being for counsel fees. To this bill of complaint the defendant interposed a demurrer. The Special Term sustained the demurrer, thus deciding that as a matter of law the bill did not set up a good cause of action. The complainant appealed from this decree, and the General Term reversed the decree of the Special Term, and thus having disposed of the question of law, remanded the case to the Special Term, which passed a decree in favor of the complainant. From this decree the defendant appealed, and the decree of the Special Term was reversed and the bill dismissed. The complainant then filed a petition for a rehearing, which was *denied*.

Messrs. H. O. & R. CLAUGHTON for petitioner.

Messrs. J. AMBLER SMITH and COLE & COLE for defendant.

The opinion of the court, delivered by Mr. Justice JAMES, upon the petition for a rehearing was as follows:

This is a motion for a rehearing in the case of McKenzie vs. Underwood. In the reported opinion, only one of three or four points involved in the case was really discussed or positively decided.

Other points, however, were involved in the determination of the case and were considered and decided. One of them was that the fund which the petition proposed to reach, as the property of Judge Underwood in the hands of his administratrix, never formed a part of his estate, but consisted of an appropriation for the benefit of his wife after his death.

It is immaterial whether we were right or wrong on the point discussed in the opinion. In any case that fund could not be reached.

It is suggested in the petition for rehearing that the case was hastily decided by the court. It was carefully considered.

The decree which we reversed held the defendant, who was an administratrix, personally liable. Of course that was incorrect if the assumption of the decree that she held the property in question as administratrix of the estate of John Underwood was wrong.

The rehearing, therefore, is denied, and the motion is overruled.

NICHOLAS T. HALLER

vs.

NATHAN B. CLARK.

EVIDENCE; HUSBAND AND WIFE; EXCEPTIONS; AUDITOR'S REPORT;
ACCEPTANCE; JUDICIAL COGNIZANCE; FEES OF AUDITOR.

1. A wife is not a competent witness for her husband. The fact that she has been constituted the agent of the parties to a suit in which her husband is a defendant does not render her competent, as the parties must be presumed to have selected her as such, with reference to her existing incapacity to testify.
2. Exceptions to an auditor's report should not leave the Court in doubt as to whether the ground of complaint is an absence of evidence, or a preponderance against the auditor's conclusion, or whether the testimony relied on was inadmissible in law. Such exceptions will not be considered.
3. The findings and conclusions of the auditor upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, his report will be allowed to stand.
4. If in a suit to enforce a mechanics' lien it appears that certain parts of the contractor's work were accepted by the defendant after they were completed, such acceptance implies that the work is to be paid for, and it is too late to renew objections that had thus been waived, after suit is brought.
5. The Court may take cognizance of matters of history sufficiently to know the facts in regard to the shipment of English brick to this country.
6. The apportionment of the auditor's fee and the amount is within the discretion of the special term.

In Equity. No. 9,869. Decided October 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the defendant from decree of Special Term modifying report of Auditor. *Affirmed.*

The facts are stated in the opinion.

Messrs. CARUSI & MILLER for defendant (appellant).

Mr. E. H. THOMAS for plaintiff (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This is a bill in equity filed by the complainant to enforce a mechanics' lien for work done on a dwelling situated near Rock Creek on K street in the city of Washington, belonging to the defendant.

The bill alleges that on the 9th of October, 1885, the complainant entered into a contract with the defendant to remodel the building for the sum of \$2,800, to be paid in installments; that in accordance with the requirements of the contract he did remodel it and became entitled to the payment of the sum agreed on, but the complainant only paid him \$1,200, leaving a balance of \$1,600 due; that during the remodeling of the dwelling, certain extra work was done by agreement, for which \$460 is a proper remuneration, but no part of which has been paid; that the building was completed by the 20th of February, 1886; and he claims the benefit of the statute to enforce his lien against the property.

The defendant, in his answer, replies at length to the charges made by the complainant. In general it is enough to say he admits having made the contract referred to and made an exhibit to the bill, and that the complainant claims to have performed the contract; but he denies that he did so; he avers that the work was not done by the complainant according to his obligation, and that what was actually done, was of such inferior character, that it was of very little use to him; that the extras were matters which the complainant was obliged to do under the contract, and that they were badly done like the rest of the work; that the result of the whole affair was the house was unlike that which the complainant had contracted to present to him, after being remodeled; and was so inferior in workmanship, and so defective, that he was obliged to expend in making it habitable a large sum of money, claimed in his exceptions to the auditor's report to amount to \$3,641.50; which if a cross-bill had been filed and the defendant's claims were proved would represent what the complainant would have to pay, in addition to his outlay in repairing the house.

One of the items in this statement is a charge of \$650 for

the improper construction of the front wall of the house. Another is \$400 on account of plastering badly done; another is \$917.52 for repairs that were rendered necessary by the bad work of complainant; \$350 for changes in the plans; and there is also a claim of \$350 loss of rent by delay.

The contract entered into between the parties originally is a very remarkable document. If they had taken special pains to devise a scheme by which they would surely get themselves into trouble, they could scarcely have succeeded better than they did in this agreement. It was prepared on a blank printed and prepared to be used in a town in New York; and is stated therein to be the copyright property of the inventor; and is intended for record in the town clerk's office in that State. Evidently the defendant and complainant began to expend their money for attorneys too late; they should have gotten some capable person to prepare their contract before the work began.

In the printed part of the agreement Haller contracts "well and sufficiently to *erect*, finish and deliver the house in a true, perfect, and thoroughly workmanlike manner," although the house had been erected for many years. Then, in writing, he agrees: "To remodel an old house, said house to be turned into flats, located on K street, between 26th and 27th streets, northwest. Work required in the erection and completion of said building or flats for the party of the second part, on ground situated as aforesaid, in the city of Washington, District of Columbia, agreeably to plans, drawings and specifications prepared for said works by Nicholas T. Haller, architect, to the satisfaction and under the direction and personal supervision of *Nicholas T. Haller, architect*." The latter part of this paragraph was afterwards changed, by interlineation so as to read "to the satisfaction and under the direction and personal supervision of *Mrs. H. W. Clark, architect*"—she being the wife of the defendant. Then follows a covenant by the party of the second part that he will pay for the work: "Provided that in each case of said payments, a certificate shall be obtained from and

signed by *Nicholas T. Haller*, architect, to the effect that the work is done in strict accordance with the drawings and specifications and that he considers the payment properly due." The chances were, decidedly, that Haller as architect would probably have no great difficulty in certifying that his own work as contractor had been properly performed. But a valuable safeguard was introduced in the latter part of the contract, in these words: "Should any dispute arise respecting the true construction and meaning of the contract and specifications, as to what is extra work outside of the contract, the same shall be decided by *Nicholas T. Haller, architect*, and his decision shall be final"; which also was changed, so as to read: "The same shall be decided by *Mrs. H. W. Clark, architect*, and *his* decision shall be final."

The result that might have been expected followed. The parties differed, of course; and that was the occasion of the filing of this bill. The case went to proof, and on the 29th of June, 1889, the court below referred it to Mr. Johnson, as special auditor, to examine the testimony taken in the cause, and *digest the same for the court*, and report what deduction, if any, should be made from the claim of complainant for omitted work, and for defective work, as in violation of the contract with the defendant; also for work done by defendant in making good defective work of complainant; also to allow for all money paid by defendant for and on account of mechanics' and material men's liens filed in the clerk's office against said property. All questions respecting the competency of the testimony, or any part thereof, the legal rights of the parties upon the whole proof, were to be passed upon by the auditor, subject to the review of the court. The auditor was also required to set forth the items claimed and allowed or disallowed by him, so as to present his findings to the court in detail.

On the 24th of July, 1889, that order was modified by vacating so much as required the auditor *to digest the testimony*; and directing him to ascertain, pass upon, and re-

port the claims set forth in the complainant's bill and the defendant's answer, and the claims of the defendant for recoupment, as set forth in the answer and testimony.

The testimony taken in the case fills four volumes, containing upwards of fifteen hundred pages of type-writing, which the solicitors say they analyzed before the auditor for twenty-two days. The auditor made his report, which varies from the claims of the two parties in several respects.

There were fifteen items of extra work claimed by the complainant. The auditor rejected two of them; one for putting in a servant's water closet, and the other for putting in a window. He reduced the item for putting in wooden girders, from \$100 to \$50; allowed the defendant \$70 on four items which are embraced in the defendant's bill of particulars; and gave him credit for \$1,200 paid, and for \$637.84 which he had paid to material men, who had filed liens against the property; and as a result of his examination he reported the balance due to the complainant to be \$1,608.96.

Thereupon eighty-four exceptions to the report were filed by the defendant, and on these the case was heard by the equity court. The industry of counsel for the defendant in preparing this volume of complaints is certainly very remarkable; but their examination has imposed a very serious burden upon the court in a case of very moderate pecuniary importance. We have endeavored as far as we possibly could, to make that examination thorough.

The only question of law raised by the exceptions, is whether Mrs. Clark, the wife of the defendant, was a competent witness to testify in behalf of the defendant. Upon objection by the complainant the auditor declined to consider her testimony and that ruling was affirmed by the Justice below.

Plainly she would not have been a competent witness for her husband at common law; and we think the Evidence Act has made no change in that regard. As was said in *Lucas vs. Brooks*, 18 Wallace, 436, the objection to the tes-

timony of the wife when offered in behalf of her husband, rests solely upon grounds of public policy and to that the statute has no application.

It is insisted, however, that by the terms of this contract Mrs. Clark was constituted the agent of the parties, which brings her within a recognized exception to the rule; and in support of this doctrine, several cases were cited; but they fail to sustain the contention.

When the parties selected Mrs. Clark as their agent, as is insisted, they must be supposed to have done so with reference to her existing incapacity to testify, which might operate unfavorably to either party; but this hardship does not remove the objection to the reception of her testimony upon the grounds of public policy.

In the case of *Stickney vs. Stickney*, 131 U. S., 227, which has been cited as showing in some way a modification of the strictness of construction on this point this question of agency was not involved. There, a widow was allowed to testify with respect to her separate estate, and to give a history of her investments, although some of her money had passed through her husband's hands. The ruling of the court below on this point was correct.

We are met by a difficulty as to the form of these exceptions. In *Alexander's Chan. Pr.*, page 127, it is said: "Each exception should point to some particular fault in the report. General exceptions are not to be allowed."

In *Harding vs. Handy*, 11th Wheaton, 126, Chief Justice Marshall says: "The exceptions are to be regarded so far only as they are supported by the special statements of the master or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exception relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail."

In *Story vs. Livingston*, 13 Peters, 365, the court, in considering exceptions to a master's report, said: "All these exceptions, except the third, are irregularly taken, and

might be disposed of by us without any examination of them in connection with the master's report. They are too general; indicate nothing but dissatisfaction with the entire report, and furnish no specific grounds, as they should have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded. * * * Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted."

In *Greene vs. Bishop*, 1 Clifford, 192, the court said: "General exceptions are not sufficient. A party excepting to the report must designate particularly the erroneous action excepted to, and refer the court distinctly and clearly to the ground of his exception."

Exceptions should not leave a court in doubt whether the ground of the complaint is an absence of evidence, or a preponderance against the auditor's conclusion, or whether the testimony relied on was inadmissible in law. To enter upon a conjectural search to ascertain the ground of complaint would compel us to explore the entire cause, in examining each exception in the endeavor to discover defects in the proofs, which the exceptant had not taken the trouble to call to our attention.

A reading of a few of these exceptions will show how completely they violate this rule.

In No. 10½, he excepts "to said report as allows plaintiff \$2,800, because proof shows plaintiff did not perform his contract"; in No. 11 he excepts "to said report as allows plaintiff \$1,600 as balance of contract price of \$2,800, because plaintiff did not perform his contract." In No. 11½ he excepts "to the said report as finds the wall was erected as per contract, because same is not supported by the proof." In No. 12, he excepts "to said report as finds said wall was substantially erected as per contract, because same is not supported by proofs."

These are samples of many of the eighty-four exceptions,

which are substantially like those which, in *Story vs. Livingston*, 13 Peters, 365, the court held were insufficient. The application of this principle excludes from our consideration a large proportion of the exceptions.

The rule by which we are governed in considering such exceptions as are proper in form, has been repeatedly laid down by the Supreme Court of the United States, and is repeated in *Crawford vs. Neal*, 144 U. S., page 585, where the court says: "The findings and conclusions of a master upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, the decree should stand." In the recent case of *Furrer vs. Ferris*, 145 U. S., page 134, the court restates this position, and cites with approval the case of *Crawford vs. Neale*, with a number of others, to the same effect.

The testimony has been examined with reference to such exceptions as are properly taken. To attempt a recital of it at this time would be an improper consumption of time, not justified by our engagements, by the rights of other suitors, or the importance of this case. We can now refer to only a few of the exceptions of the class we refer to.

The most important are those which go to the rejection of the entire claim under the contract, for the \$2,800, on the ground that none of it was earned because the work was not performed in accordance with the contract and specifications, and most of what was done was so badly executed that no obligation rested upon the defendant to pay for any part of it. A serious controversy exists as to what were the contracts and specifications which were actually adopted by the parties, as several forms of contract were before the parties at different times, and four sets of drawings and specifications were produced before the auditor.

The auditor examines this contention, and states as his conclusion from the testimony that those marked W. H. S. No. 1 and N. B. C. No. 3, are more in consonance with the house as remodeled than any of the others.

This is made the subject of defendant's exceptions Nos. 3 to 10, inclusive, and of eleven pages in his first printed brief, and of fifteen pages in the printed brief of the complainant. Each argument is largely composed of quotations and references to the volumes of testimony. An examination of these arguments and references has failed to disclose "such serious or important mistake" by the auditor in his consideration of the evidence upon this point, as is required by the Supreme Court, in *Crawford vs. Neale*.

Many of the defendant's objections to particular portions of the work are disallowed by the auditor, upon the ground that those parts were accepted by the defendant after they were completed. If this were the fact, such acceptance implies that the work was to be paid for; and it would be too late to renew objections that had thus been waived, when suit is brought to recover, *Dermott vs. Jones*, 2 Wallace, page 9, and this, although the work may not have been done according to the stipulations of the contract.

"Where deviations from the plan furnished by the contract are made known to the party entitled to insist upon a compliance with it, his assent, as in like cases, may be presumed, if he, having opportunity, and having his attention expressly directed to the subject, do not insist upon his rights with such a degree of consistency and firmness as shall amount to a notice of his dissent. A mere complaining of the aberration, while it may have been rectified, followed by conduct or language that indicate acquiescence, will not enable him, when the work has proceeded too far for remedy, to take advantage of the faulty particular." *Barley vs. Woods*, 17 New Hampshire, 371.

Such seems to have been the conduct of the defendant with respect to the front wall and other portions of the building now complained of. The defendant insists that as the contract required the entire front wall to be taken out of the house, he is entitled to recoup \$650 from complainant's claim on this account. It is shown the complainant removed the entire wall, except the extreme ends,

which were left as piers to prevent the walls of adjacent houses from falling in. The evidence is that this arrangement was a safe one; that Clark saw exactly what was being done, and when he complained it was not satisfactory Haller said he would make it so, and that he did make alterations in the work and had it sanded and painted; and that notwithstanding the previous complaints, payments were afterwards made by Clark upon the work.

The statement as to bad workmanship in using the so-called old English brick with the smaller new brick, is not sustained by the evidence, certainly not to an extent beyond the \$75 allowed to the defendant by the court below on this account. The photograph of the front wall, as now existing, does not disclose the irregularities and imperfections said to disfigure its appearance. Whether there ever were any English brick in the building may well be questioned. So much importance was attached to this pretension that we are justified in recognizing as matter of history, that in the early colonial days, while the exports from this part of the country consisted of tobacco and other bulky commodities, the goods needed for the return cargoes were made up of lighter articles, such as manufactured goods, and delicacies of food and raiment. There was, therefore, a necessity to take ballast on board in England; and as long as the people here would buy brick thus imported, they constituted a profitable form of ballast. But the shippers soon found, at least one hundred years before this house was built, that the people would not buy inferior English brick when they could procure a far better domestic article at a smaller price. The neighborhood of Washington soon became famous for the excellence of its brick, and the millions of bricks used in the construction of the Capitol and other public buildings, before the K street house was built, were burnt on the spot. The strong probability is that no house in this city was ever built of English brick—the popular superstition to the contrary. As matter of fact the English brick were smaller instead of larger than the American brick; the English statute in force

about the time of the Revolution, requiring them to be only eight inches in length, instead of nine, as in this country.

It is needless to go further through the mass of exceptions. It is enough to say we are satisfied justice has been done to the parties by the decree of the court below, which modified the auditor's report in several respects. The auditor had reduced the bill for extras to \$385 from \$460, and the trial Justice cut it down to \$330. The auditor also allowed \$170 on account of claims of the defendant, and this was increased to \$278. He also changed the allowance of interest, so that instead of the sum of \$1,600, as stated by the auditor, the decree of the court below was \$1,014.10. We think that ruling does full and substantial justice to the parties.

The court's apportionment of the fee of the auditor and its amount would seem to be within the discretion of the justice below, under the seventy-seventh Equity Rule; and although the sum seems liberal, considering the moderate amount involved in the case, we cannot see that the discretion was abused, in view of the great mass of evidence, and the length of time consumed in the examination of the case by the auditor; and hence there is no ground upon which we can overrule the order of the court below upon this point.

This exception, and all others inconsistent with the decree of the court below are overruled, and the

Decree is affirmed in all respects.

IN RE MICHAEL L. SULLIVAN.

LICENSE; BAR ROOM; POLICE REGULATIONS.

1. The joint resolution passed by Congress, February 26, 1892, (27 Stat., 394), did not confer upon the Commissioners the power to enact a regulation prescribing a penalty for keeping an unlicensed bar.
2. The reference in the joint resolution to the act of Congress of January 26, 1887, (24 Stat., 368), has the effect to make the classes of regulations provided for by that act, illustrations of what is meant in the resolution by regulations for the protection of "lives, limbs, health, comfort and quiet."
3. It is to matters which by their own operation, may affect life, limb, health, comfort or quiet, that the Commissioners' authority under this resolution is strictly limited. Before it can be said that the keeping of a bar room without a license is a subject which falls within this power, it must appear that such a bar room, although conducted in precisely the same manner with those that are licensed, is by reason of its want of license distinguishable from the latter as to its effect on health or public comfort or quiet.
4. The failure to obtain a license is not necessarily an act which in itself is capable of affecting health or quiet or comfort.

Habeas Corpus. No. 193. Decided October 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing in General Term in the first instance of a petition for a writ of *habeas corpus*. *Granted and petitioner discharged.*

The facts are stated in the opinion.

Mr. LEON TOBRINER for petitioner.

Messrs. GEORGE C. HAZELTON and S. T. THOMAS for respondents.

Mr. Justice JAMES delivered the opinion of the Court:

This is a petition for a writ of *habeas corpus*. It states that on the 29th of September, 1892, the petitioner was tried in the Police Court of the District of Columbia on an information charging that he "did engage in keeping a bar

room or tippling house where distilled or fermented liquors, wines or cordials were sold without then and there having a license for that purpose, contrary to and in violation of section 1, article 16, of the Police Regulations of the District of Columbia," and on the day and year aforesaid, after a trial by jury, was adjudged guilty of said charge and was sentenced to pay a fine of \$100 and costs, and, in default thereof to be committed to the work-house of said District for the term of ninety days, and that thereupon he was, on the 13th day of September, 1892, in default of the payment of said fine and costs, under the judgment aforesaid, committed into the custody of the intendent of the Washington work-house of the District of Columbia, and is now in the custody of the said intendent. The petitioner avers that section 1 of article 16 of the police regulations under which he was prosecuted, convicted and committed is without authority of law and invalid, and that the Police Court was without jurisdiction to proceed against him for any alleged violation of said section.

A certified record of the proceedings of the Police Court is annexed as a part of the petition. From this it appears that the petitioner as defendant in the Police Court filed a motion to quash the information, and a motion in arrest of judgment, but afterwards withdrew all motions in the case, and submitted himself for sentence.

The respondent sets forth in his answer as the cause of the petitioner's detention the proceedings in the Police Court.

The police regulation on which the information in this case was founded is in the following words: "Section 1. No restaurant, bar room, sample room or tippling house where distilled or fermented liquors, wines or cordials are sold shall be kept in the District of Columbia without a license therefor first had and obtained in accordance with the provisions of existing law and the following regulations. And any person violating the provision of this section shall on conviction, be punished by a fine of not less than \$100 nor

more than \$250 for each and every offence, and in default of payment of such fine, such person shall be committed to the work-house of the city of Washington, in said District, for a period of not less than three nor more than eleven months."

The commissioners of the District claim that authority to enact this regulation was conferred upon them by a "joint resolution to regulate licenses to proprietors of theaters in the city of Washington * * * and for other purposes," passed by Congress, February 26, 1892, which was in the following words: "Section 1. That all licenses issued by the Commissioners of the District of Columbia to proprietors of theaters or other public places of amusement in the city of Washington, District of Columbia, and now in force be, and the same are hereby, terminated, unless the persons holding such licenses shall within ten days after due notice comply with such regulations as may be prescribed for the public safety by the Commissioners of the District of Columbia.

"Section 2. That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under the act of January 26, 1887, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia."

It has been assumed by the Commissioners that this grant included power to prohibit not the keeping of any bar room, but the keeping of a bar room without license, and to enforce such prohibition by fine and imprisonment.

In the construction of this grant of power the first question is whether it is affected by the reference to the act of January 26, 1887. We think, in the first place, that the words "in addition to those already made," under that act, necessarily mean "those already made in accordance with," &c., so that reference is actually made to the provisions of the act itself. In the next place, we must hold that this

description of the regulations yet to be made as being "in addition" to those already authorized must have been intended to have some effect, and we think they would be inoperative unless they contemplated an extension of the class of regulations already authorized. It is necessary, therefore, to consider the act of January 26, 1887. It enacted as follows:

"That the Commissioners of the District of Columbia are hereby authorized and empowered to make, modify and enforce usual and reasonable police regulations in and for said District as follows:

"First. For causing full inspection to be made at any reasonable times of the places wherein the business of pawn-broking, junk dealing or second-hand clothing business may be carried on.

"Second. To regulate the storage of highly inflammable substances in the thickly populated portions of the District.

"Third. To locate the places where licensed venders on streets and public places shall stand and change them as often as the public interests require, and to make all the necessary regulations governing their conduct on streets in relation to such business.

"Fourth. To make needful regulations for the orderly disposition of carriages or other vehicles assembled on streets or public places and to require vehicles upon such streets and avenues, as they may deem necessary, to pass along the right side thereof.

"Fifth. To establish and regulate the charge to be made by owners of hacks and hackney carriages of any kind whatever.

"Sixth. To prohibit conducting droves of animals upon such streets and avenues as they may deem necessary to public safety and good order.

"Seventh. To regulate the keeping and running at large of dogs and fowls.

"Eighth. To prohibit the deposit upon streets or sidewalks of fruit or any part thereof or other substances or

articles that might litter the same or cause injury to or impede pedestrians.

"Ninth. To regulate or prohibit loud noises with horns, gongs or other instruments or loud cries upon the streets or public places, and to prohibit the use of any fireworks or explosives within such portions of the District as they may think necessary to public safety.

"Tenth. To regulate the movements of vehicles on the public streets or avenues for the preservation of order and protection of life and limb."

We have quoted these provisions at length because all of the regulations which they authorize relate to either life, limb, health, comfort or quiet and because the reference to them in the joint resolution has the effect to make them illustrations of what is meant in that resolution by regulations for the protection of "lives, limbs, health, comfort and quiet."

In the light of these illustrations the Commissioners would seem to be authorized to prohibit certain acts or conduct, by whomsoever done, because they would endanger life, limb, health, comfort or quiet, and on the same grounds to regulate the manner in which acts not prohibited shall be done. For example, they would be authorized to forbid the keeping open of any bar room after certain hours of the night, or to regulate the manner in which they should be conducted while open, and to impose proper penalties for the violation of such regulations. Both of these are matters in which public comfort, quiet or health may be concerned. But it is to matters which, by their own operation, may affect life, limb, health, comfort or quiet that this authority is strictly limited. It is with acts and conduct which, by whomsoever done, tend in themselves to impair one of these public interests that the Commissioners are authorized to deal. Therefore, before it can be held that the keeping of a bar room without license is a subject which falls within this power it must appear that such a bar room, although conducted in precisely the same manner with those that are

licensed, is, by reason of its want of license, distinguishable from the latter as to its effect on health, public comfort or quiet. That it is thus distinguishable even if it be conducted in the most orderly and wholesome manner is necessarily assumed by this regulation. This is the basis of the regulation, but in its actual form this basis is substantially ignored. In terms it provides simply a penalty for disregarding the license law and evading the license tax.

We cannot hold that the failure to obtain a license is an act which in itself is capable of affecting health, quiet or comfort. Undoubtedly a business which is carried on in defiance of law is likely to be carried on in an improper manner, but it is not at these improprieties that this regulation is aimed. As we have said, it deals only with the impropriety of carrying on this business at all, and in any manner, without first obtaining a license to do so.

So long as licenses for engaging in this kind of business are required it is to be greatly regretted that adequate penalties have not been provided for those who carry it on in defiance of law. It is known to this court judicially that what is begun in defiance of law is accompanied on all sides with such defiance. The mischief done by these unlicensed places, the corruption which they breed, the crimes which they cause, can hardly be estimated. The calendars of our courts are black with their results, but even these disclose only a part of it. The seat of government of a decent and law abiding people is disfigured and made disgusting by evils which, if not cured, could be diminished by legislation, and there is strong temptation to supply its absence by bold construction of law. But we are not allowed to cure unlawful conduct by assuming unlawful powers. Until this people shall give us power to cleanse their capital we can only suffer and be held responsible for evils we cannot cure.

It is with profound regret that we must hold the well intended regulation of the Commissioners to be invalid. The petitioner, who is held in custody under it, must therefore be discharged. An order will be made accordingly.

SILAS MERCHANT AND ANNA J. MERCHANT
HIS WIFE *vs.* JOHN F. COOK AND THOMAS
M. SHEPHERD, TRUSTEES.

DURESS; THREATS.

1. Where a wife is induced to execute a deed conveying her real estate, under the influence of threats that otherwise her husband would be prosecuted criminally, the deed is not to be considered as her voluntary act, and may be avoided by her.
2. In such a case, it is immaterial whether or not the vendee took active steps to procure the execution of the deed, so long as it was for his benefit.

In Equity. No. 8,086. Decided October 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing in the first instance of a suit in equity to annul a deed alleged to have been executed under duress.

The facts are sufficiently stated in the opinion.

Messrs. COOK and COLE for plaintiffs.

Messrs. RIDDLE, DAVIS and PADGETT for defendants.

Mr. Justice JAMES delivered the opinion of the Court:

The complainants pray that a certain conveyance of property in this city, which belonged separately to Mrs. Merchant, may be decreed to be void on the ground that it was obtained by duress.

It appears by the testimony that at the time of the transaction in question, the defendant Cook was Collector of Taxes for this District, and the complainant, Silas Merchant, was cashier in the same office; that on the day before this conveyance, Merchant and Cook were called before the District Commissioners, in the office of the latter, and Merchant was asked to explain a deficit which appeared in his accounts. After some conversation, Major Twining, the Engineer Commissioner, addressing both Cook and Mer-

chant, said that, although the cashier had not been appointed by Mr. Cook, but by superior authority, Cook was liable primarily for the deficit, and that Merchant must answer to Cook. He proceeded to say that the matter must be attended to at once; that it was a case of embezzlement; that they (the Commissioners) had taken advice of counsel and would place the papers in the hands of the District Attorney unless he, Merchant, should secure the debt within twenty-four hours. Cook testifies that he understood the threat of prosecution to be aimed at him, or at least at him as much as at Merchant. Donovan, a disinterested witness, sustains Merchant's statement that the threat was addressed to the latter.

Afterwards, when Cook and Merchant had returned to the Tax Collector's office, Vinson, the Auditor of the District asked Merchant how he could secure the deficit, and drew from the latter the fact that his wife had property, and that he could give security in that way. It was understood that the security should be of that character. That night Merchant related all the circumstances to his wife, informing her that he was threatened with prosecution. On the following day Vinson prepared the papers which were afterwards executed, having obtained a description of Mrs. Merchant's property. Vinson, having these deeds with him, called Merchant to accompany him in a carriage to the house of the latter. Several other persons belonging to the Tax Office went with them. Mrs. Merchant, who was unwell, was called down stairs by her husband, the papers were presented to her and she executed them. There is some dispute as to the circumstances of her acknowledgment; but the testimony seems to show that Mr. Merchant was in another part of the room when the examining officer took her acknowledgment, and that the proceeding was conducted with the usual degree of ceremony. It should be observed that in this transaction Mrs. Merchant conveyed to Cook all the real estate that she possessed.

Soon afterwards Merchant was dismissed from the Tax

Office, but was permitted to examine his old accounts with a view to his establishing that he was not responsible for any deficit. The result was that Mrs. Merchant, joined by her husband in the action, as she had been in the conveyance, has filed this bill, claiming that the conveyance to Cook, although absolute in form, was given only as a security for whatever deficit might appear; that Merchant was not in fact liable for any deficit, and that this conveyance was obtained from her by duress of threats.

We have to consider, first, what conclusions of fact are established by the testimony, and second the legal effect of these facts.

We are satisfied, in the first place, that Commissioner Twining, with the concurrence and by the authority of all the Commissioners of the District, charged Merchant with embezzlement, and threatened to take steps to prosecute him for that crime, unless he should within twenty-four hours secure payment of the amount of his alleged deficit. It is admitted by the defendant Cook that such words of menace were uttered, but he says he understood at the time that they were addressed as well to himself as to Merchant. We are satisfied he understood that at all events the latter was menaced with prosecution unless there should be a settlement. It does not appear that the Commissioners, or that Major Twining knew that the security demanded of Merchant could be given only by Mrs. Merchant, and that the menace therefore meant that the husband would be prosecuted for embezzlement unless the wife should secure payment by means of her property. But it does appear that Vinson, the auditor, was acting in view of what had been said on behalf of the Commissioners, and was in effect pressing that threat when he proceeded to prepare a deed for Mrs. Merchant to sign. The whole transaction was so connected that the deed prepared for Cook's benefit was nothing less than the threat put into form. We think it is immaterial that the menace of prosecution was not addressed to Mrs. Merchant; it is enough that it was made, and that it came to

her as it was made. Our conclusion is that she signed that deed under the pressure of an understanding that her husband was to be prosecuted for the crime of embezzlement unless she should do so.

What was the legal effect of her signature and acknowledgment under such circumstances?

It is an unquestioned principle that what is done by a person without his own consent is not, in a legal sense, his act at all. For example, if one sign an instrument under compulsion of a force which he cannot be expected to resist, the law holds that there has been a complete absence of consent on his part, and that therefore he has done nothing. The alleged act is a nullity. It is now established that this principle applies when a father is induced to execute a contract by threats that, unless he does so, his son will be prosecuted for a felony; or when a wife is induced to do a similar act by like threats concerning her husband. To the honor of judicial manhood, it is held that neither a father nor a wife can be expected to exercise will in the presence of such threats, and that when either yields to them, the act must be considered to have lacked the legal element of consent, and is therefore to be treated as a nullity.

A very interesting discussion of this principle may be found in *Williams vs. Bayley*, L. R., 1 H. L. Cases, 200; S. C., 35 L. J. N. S., Eq. 717. In that case a father had indorsed for his son, after which the son forged numerous indorsements. At length the holders of the paper pressed the father for a settlement. In their interviews with him, they did not say in direct words that the son was guilty of forgery and that they should prosecute and would enforce the penalties of the law, but they did say: "We do not wish to exercise pressure on you if it can be satisfactorily arranged." The specially interesting feature of this case is that the court were willing to gather from vague and indefinite language the actual presentation of a menace of prosecution, and then to apply the doctrine of duress. Nothing could better illustrate the watchfulness of the courts to de-

feat this cruel process of reimbursing losses out of the sympathy and terror of innocent persons. Speaking of the father, Lord Westbury said:

"The only motive to induce him to adopt the debt was the hope that by so doing he would relieve his son from the inevitable consequences of his crime. The question, therefore, is whether a father, appealed to under the circumstances to take upon himself an amount of civil liability, with the knowledge that unless he does so his son will be exposed to a criminal prosecution with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon from the father of a felon under such circumstances."

Afterwards his Lordship added:

"A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation. I have, therefore, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father, under such circumstances, was not the security of a man who acted with *that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description.*"

These observations remind us that Mrs. Merchant, too, was called upon to give security for the debt of another, that hers was a contract for which she received no consideration, and therefore was, in the words of Lord Westbury, "above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it." The requirement of free consent, which is applied to all contracts, is intensified in such transactions as this, and any

disregard of it is to be more sternly treated. Instead of being allowed "that freedom and power of deliberation" which Lord Westbury considered "necessary to validate a transaction of such a description," Mrs. Merchant was called upon by the officer who had the auditing of her husband's accounts, accompanied by others representing the same office, to decide suddenly and without any deliberation whether she would pledge all of her property for the purpose of averting a prosecution of her husband for the alleged crime of embezzlement.

In this country a similar principle has been applied to the case of the wife. In *Eadie vs. Stimmon*, 20 New York, 9, the action was to recover \$2,000 on a life insurance policy which had been obtained for the benefit of Mrs. Eadie, and was by her assigned to the defendant Stimmon. It appeared that the defendant claimed that Mr. Eadie was liable to him for moneys embezzled, and went to the house of the latter to demand a conveyance of his house and an assignment of this policy. Mrs. Eadie was informed during a wrangling discussion that the defendant intended to prosecute her husband criminally unless his demands were complied with, and that an officer was already waiting to arrest him. Finally she executed an assignment of her policy. The court of appeals said: "I can imagine no duress over a man, no restraint over his person, or dread of personal injury, more likely to deprive him of free agency, and induce him to yield to the wishes and demands of another, than the duress over this woman, operating through appeals thus addressed to her pride, her fears, her affections and sensibilities." The wife's assignment was held to be invalid.

In New Jersey it was held by the Vice-Chancellor, in the case of *Lomerson vs. Johnston*, 44 N. J. Eq., 93, that when the creditors of the husband induce the wife to join with him in giving a mortgage on her real estate to secure his debt, by telling her that he had been guilty of embezzlement and could be imprisoned for that crime, and it appeared that such statements had created fear or just apprehension, the reasonable conclusion is that the free agency of the wife was

overcome; that the execution of the mortgage was obtained by undue pressure, and that it cannot be enforced against the wife's real estate.

We think that these authorities are sufficient support for the proposition that a wife cannot be considered to have consented in a legal sense, when she has been induced to secure the debt of her husband by threats to prosecute him for the crime if she should refuse to do so.

It was objected, however, at the argument, that it appeared in all the cases cited that the menace of prosecution had come from the person secured, and that in the case before us Cook did not appear to have had anything to do with the threats of prosecution.

We have already pointed out that when he received this deed he had actual knowledge of the threats which had been coupled with a failure to give security. The circumstances would justify a conclusion that, when this deed was handed to him, he must have known at once that it was the product of those threats. At all events, it is immaterial that he took no active part in procuring the execution of the mortgage. The work was done for his benefit, and he could not accept the end without adopting the means.

A similar objection was raised in the case of *Central Bank of Frederick vs. Copeland and wife*, 18 Md., 306. In that case it was the husband who had compelled the wife, by means of harshness and threats, to mortgage her property to secure his debt. Cochran, J., speaking for the court, said: "The fact that McPherson and Thomas (the mortgagees) personally took no active part in procuring the execution of the mortgage by Mrs. Copeland, does not strengthen their right to set it up as a valid deed, nor does it impair her right to avoid it. Its execution was procured by the husband, acting in their interest and for their benefit, and as their acceptance of the mortgage implies an adoption of his agency, they can have no right to enforce it, free from infirmities originating in this use of unconscionable means to compel its execution."

A decree annulling Mys. Merchant's deed will be made.

WILLIAM W. RAPLEY

vs.

GEORGE A. SHEHAN.

EVIDENCE; OBJECTIONS; NEW TRIALS.

1. When the objection to a question put to a witness, or the objection to his answer, is general, without the statement of any reason or grounds upon which the objection is made, neither the objection nor any exception that is sought to be saved under it is of any validity.
2. Upon an appeal from an order overruling a motion for a new trial on the ground that the verdict was against the weight of the evidence, this court will not reverse the judgment below unless it shall clearly appear that the evidence was entirely insufficient to justify the verdict.

At Law. No. 28,521. Decided October 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the plaintiff on a bill of exceptions and case stated from a judgment overruling a motion for a new trial.
Affirmed.

The facts are sufficiently stated in the opinion.

Messrs. ENOCH TOTTEN and E. A. NEWMAN for plaintiff (appellant).

Mr. H. E. DAVIS for defendant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This cause is here on exceptions and a case stated. The declaration contains three counts. The first is a special count for rent for a part of square west of square 471 and certain water front, wharf property and docks lying south and west of said square, of the yearly rental of \$900, payable monthly, and the sum of \$1,950 is claimed as rent in arrears for the 26 months ending February 29, 1888; the second is a special count in *indebitatus assumpsit*, for use and occupation of said premises; and the third is the common money

counts. Particulars of demand, notice to plead and affidavit are attached to the declaration.

The first, second, and third pleas are the general issue; the fourth plea admits \$439.78 due the plaintiff as collections of rent made by the defendant as the agent of plaintiff, of which amount tender was made before suit. An affidavit of defendant is annexed to the pleas.

May 3, 1888, issue was joined. Trial was had, and on October 21, 1890, a verdict and judgment was rendered for plaintiff for \$439.78, with costs. On the 24th day of October, 1890, the plaintiff filed a motion for a new trial for the reasons (1) that the verdict is contrary to the evidence; (2) that the verdict is against the law; (3) that the verdict is otherwise erroneous and wholly unsustainable on the evidence and instructions of the court; (4) that the court erred in its rulings of law at the trial, to which rulings exceptions were then and there taken by plaintiff's counsel, and duly noted on the minutes of the court before the jury retired.

A motion for a new trial was overruled November 24, 1890, and an appeal was taken from that decision to this court.

On the trial, the real defence of the defendant to the action of the plaintiff was that he surrendered the premises alleged to have been leased by the plaintiff to him, Shehan, on the last day of December, 1885, and that from that time he acted as agent of the plaintiff in the collection of rents for a portion of his property, namely, square west of square 471, and that as to the wharf property he had, with the assent of the plaintiff, on the very day that he rented of the plaintiff, in 1878, executed a sub-lease to an ice company, that the ice company had paid rent for a time, and then was succeeded by a party by the name of Rich, who paid rent up to the date that the defendant, Shehan, surrendered all the property, both the wharf property and the square west of square 471, to the plaintiff.

Rapley, the plaintiff, denies that there ever was a surrender of the possession of the premises, or any part of it, to

him. He claims that this property, from the 1st of January, 1886, to February 28, 1888—for twenty-six months—was all of it still, as a matter of law, and under the relations between him and Shehan, in the possession of Shehan, under the original lease; that Shehan was still under obligation to pay him the sum of \$900 per annum, rent for this property, during the twenty-six months embraced in the suit. That constituted the issue of fact between the parties.

Plaintiff, in his brief, says that this is the principal question now involved in this case. He says of the exceptions taken at the trial to the rulings of the court on the questions of evidence, and to the testimony, that the several exceptions taken by the plaintiff's counsel on the questions of law raised at the trial may be found in the record, and ought to be sustained; but the principal question is, whether the evidence is sufficient to sustain the verdict, or whether the verdict is against the weight of the evidence.

Nothing more is said by counsel for plaintiff in argument to us upon the subject of the exceptions in the record. We have looked at the exceptions, and we find that they are, every one of them, obnoxious to the objection that no statement was made by counsel at the time of the grounds upon which the objection was made. It was a general objection—simply, "I object to the question," or "I object to the answer." Neither before nor after the ruling of the court sustaining the objection is there any statement by counsel of the reason or grounds upon which it is made. This has been held repeatedly by this court, as well as by the Supreme Court, to be utterly fatal to the validity of any objection, or the validity of any exception that is sought to be saved under such circumstances. *Woodbury vs. Dist. of Col.*, 5 *Mackey*, 127; *Prindle vs. Campbell*, 7 *Mackey*, 598; *Camden vs. Doremus*, 3 *Howard*, 530.

We might stop here, so far as these exceptions are concerned, but we have examined each one of them, and we do not find that any of them are apparently well founded. Of course, for the reason already mentioned, that no ground

was stated by counsel to the court for the objection, it is almost impossible for us to know what the ground might have been had it been stated; but so far as we can ascertain from the record, there was no objection made by the plaintiff at the trial that ought to have been sustained by the court.

This leaves the objection that the verdict is contrary to the weight of the evidence. We have examined the evidence. It was taken by a stenographer, and we have given it careful consideration. We are inclined to think that the preponderance of evidence was in favor of the defendant.

To be justified in setting aside the decision of the court below overruling the motion for a new trial, and in awarding a new trial, it would have to appear rather clearly to us that the evidence was entirely insufficient to justify the verdict; that the weight of evidence was not with the defendant, but was decidedly with the plaintiff. Of course we are not unmindful of what the Supreme Court has said in the case of Metropolitan R. R. Co. vs. Moore, 121 U. S., 558, that the court may entertain an appeal from the denial of a motion for a new trial by the special term made on the ground that the verdict was against the weight of the evidence. We think in such a case it is our duty to carefully consider the evidence that has been given in the court below and ourselves pass upon the question; but in that case it is said that of course this court in performing this duty, will not be unmindful of the fact that the jury and the judge in the court below had an opportunity to see and hear the witnesses as they testified, and had superior opportunities to what we have of judging of the weight which ought to be given to the testimony.

But we are not embarrassed in this case. After reviewing it, we find no reason for setting aside the verdict on the alleged ground that it was made against the weight of the evidence.

The judgment of the court below will be affirmed.

FRANCIS A. PETINGALE

vs.

ABRAM F. BARKER ET AL.

MARRIED WOMEN; SEPARATE ESTATE; CONSIDERATION; PROMISSORY NOTE.

1. Where the consideration for the conveyance of real estate from a husband to his wife, through the medium of a third party, consisted of her earnings and of savings of money which had been given to her by her husband, and moneys which she had received as a present from him at the time of executing deeds for him; which moneys she gave to her husband, who invested the same in real estate speculations from which profits resulted, and the husband credited her with such profits on the execution of the deed of conveyance to her, it was *held* that such money was not her separate property, and could form no valid consideration for such conveyance as against the husband's creditors.
2. When a party holding securities for an indebtedness due him, is induced to surrender such securities on the promise by the debtor to execute and deliver in lieu thereof a deed of trust on real estate, such promise forms a sufficient consideration for the subsequent execution of the deed of trust, as against other creditors of the debtor.
3. The promissory note of a married woman given to secure her husband's debt is void.
4. Equity will, when the circumstances seem to require it, treat a conveyance by a wife of real estate apparently hers, but in law the property of her husband, in which conveyance her husband unites, as a conveyance by the husband.

Equity. No. 11,380. Decided October 31, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the complainant from a decree dismissing a bill in equity. *Affirmed.*

The facts are stated in the opinion.

Mr. J. J. JOHNSON for complainant (appellant).

Mr. W. W. BOARMAN for defendants (appellees).

The CHIEF JUSTICE delivered the opinion of the Court:

This case comes here on appeal from the special term, holding an equity court. The defendant, Abram F. Barker,

and his wife, Sarah F. Barker, on the 29th of January, 1884, conveyed the property described in the bill to William W. Boarman and others in trust to secure Elizabeth E. Dyer the sum of \$4,000. On the 15th of November, 1886, Barker and wife conveyed the same property to the same trustees to secure William P. S. Sangers the sum of \$2,500. At the time of the filing of the bill, the above-mentioned trusts were due and unpaid.

On the 29th of August, 1887, Barker and wife conveyed the equity of redemption in the land or premises mentioned in the bill to Maria E. Gray, for the sum of \$5,000, and in the conveyance to Gray, Barker covenanted to pay off the trusts above mentioned, as well as to pay all the taxes due on the property. On the same day and at the same time the deed was executed to Gray, she, Gray, reconveyed the property in question to the defendant, Sarah F. Barker, the wife of William F. Barker, for the named consideration of \$3,800.

No claim is made that anything was paid by Mrs. Barker to Mrs. Gray at the time of the delivery of the deed to her by Mrs. Gray, nor was anything paid by Mrs. Gray to Barker or his wife at the time the deed was executed to her. The answers of Barker and his wife admit that neither of them paid anything to Gray as consideration for the property; but it is claimed by them in their answers and in their testimony that Mrs. Barker, instead of paying Mrs. Gray the consideration for the purchase of the property, paid \$3,800 to Barker.

On the 6th of September, 1888, complainant obtained a judgment against the defendant, Abram F. Barker, for the sum of \$2,100, with interest on \$1,000, from August 29th, 1887, and on \$1,000 from April 24th, 1888, until paid, and costs of suit. On the 21st of September, 1888, after the judgment had been rendered, and after the issue of execution and the placing of the same in the hands of the marshal, but before the return of the writ, Sarah F. Barker, with her husband, conveyed the same property to William W. Boarman and others in trust to secure her personal and indi-

vidual notes for the sum of \$2,000, payable to the defendant, Charles S. Bradley.

The bill prays that a suitable person or persons may be appointed trustee or trustees to make sale of the real estate described in the bill, and the proceeds, after satisfying all lawful and *bona fide* preferred encumbrances thereon, be applied towards the payment of the complainant's said judgment.

Upon the hearing we learned, and we find it stated in the complainant's brief, that this property has been sold by the trustees named in the two first deeds of trust, and a sufficient amount of the proceeds applied to the discharge of these trusts, leaving a residue of \$1,100, which is to await the result of this suit. So that, really, so far as the contention between the complainant and Bradley is concerned, it is as to which of these parties shall have the remainder of the proceeds of the sale of this property, being the sum of \$1,100. It is important that this statement of the plaintiff should be correct, otherwise his rights might be different, in view of our conclusion, as to the rights of the parties in this case.

The testimony in the case shows, as I have already stated, that Barker and wife conveyed this property to Mrs. Gray after executing these two deeds of trust to Boarman, as before mentioned, and that on the same day and on the same occasion, Mrs. Gray conveyed the same property to Mrs. Barker. No money passed between the parties at the time, but it is claimed that there was an actual accounting and payment of money, which, in a general way, Mrs. Barker claimed to be her own separate money and part of her separate estate, to her husband, as the consideration for this conveyance. Her own evidence and that of her husband, however, shows that it was not, in law, her separate estate; that it had accrued from her earnings and savings of money which had been given to her by her husband, and moneys which she had received at the time of executing deeds for her husband, as a present, and that she gave this money to

her husband, and he invested it in real estate speculations, from which profits resulted which her husband credited her with in this settlement made at the time of the execution of these deeds; by which it was ascertained that he had what was claimed at the time they were testifying, was her money, in his hands, and that these credits of Mrs. Barker in the hands of her husband were exchanged and cancelled by the conveyance of the property in question to her.

We think it is very clear, under the decisions of this court and of the Supreme Court of the United States, that this was not her separate property. It was really money which the husband, in law, was entitled to, and it therefore could form no valid consideration, as against creditors of the husband, for this conveyance. In the first place, it is very clear that this was not a sufficient consideration for this property. Barker covenanted in his deed to Mrs. Gray that he would discharge the prior encumbrances represented by the two first deeds of trust, and pay all the taxes that might be due upon the property. It is manifest that the actual consideration which they say was paid, even if it had been paid out of the separate estate and money of Mrs. Barker, would have been so inadequate as that, for that reason, as against a *bona fide* creditor of the defendant, Barker, it would be a fraudulent sale, and subject to be set aside, possibly preserving, as a lien upon the property, the amount which Mrs. Barker might have paid, if she had paid it in good faith, and it was absolutely shown to be her separate estate.

We find, then, that this equity of redemption which the party undertook to convey to Mrs. Barker, through Mrs. Gray, was still, notwithstanding this conveyance, as a matter of law, in Barker, and should be so treated by this court in this case, sitting as a court of equity.

In the bill the complainant states that he is informed and believes, and therefore avers and charges that said defendant Bradley holds security for the indebtedness to him by said Barker, and that said Barker gave said deed of trust

after said judgment was recovered, for the express purpose of hindering and delaying the collection of said judgment, and in fraud of complainant's just rights.

There is no testimony whatever in support of that allegation, and it is not attempted to be proven by the complainant. The testimony of Mr. Bradley in the case completely disproves it, and shows that while he did, at one time, have security for the debt which was secured by the trust executed to him in this case, he subsequently surrendered those securities to Barker some months before the execution of the deed of trust to him upon the promise of Barker that he would execute to him a deed of trust, or otherwise secure him. It is furthermore shown, I think, beyond all question, that the debt due to Bradley, created by Barker for money loaned to him by Bradley, is a real, substantial and honest one, with no question of its validity between the parties. So that this charge made by the complainant in his bill falls to the ground.

That leaves the case in this situation: The deed of trust to Bradley was, on its face, executed to secure the payment of a promissory note executed by Mrs. Barker for \$2,000.

We find that this property, to which Mrs. Barker had a deed, is not her separate property, and that she took nothing by the deed. We are really compelled to regard the deed as a nullity, and as conveying no interest as against the claim of the complainant in this case, or as against the claim of any other creditor outside of Barker himself. The equity of redemption still remains with him, notwithstanding this effort to convey it.

Of course, it results that Mrs. Barker could not execute any deed of trust to bind this property.

In the next place, her promissory note to Bradley was a nullity, and did not bind her nor her separate estate, if she had any. This is upon a well-settled principle, established by the decisions of this and the Supreme Court upon that subject.

But the evidence does show that there was an actual indebtedness on the part of Barker to Bradley. It is said

that this deed of trust was given to secure an antecedent debt, and therefore the transactions were not *bona fide* as against the claim of this complainant. There are two answers to that, and perhaps three. The first is that the evidence shows that this deed of trust was executed in pursuance of an agreement on the part of Barker, that if Bradley would release to him securities that he then held for the payment of this indebtedness, he, Barker, would secure him by the execution of a deed of trust, which promise we think would be binding, and forms a good consideration for the subsequent execution of the deed of trust. In addition to that, it is in evidence that at the time or about the time of the execution of this deed of trust, Bradley agreed to and did give to Barker a sum of money—how large it is not stated in the evidence—which Barker needed to pay interest on some of his indebtedness, if Barker would execute the deed of trust. That money would form a consideration for the execution of the deed of trust, and would relieve it of the imputation of being an antecedent debt.

We do not think that the complainant here stands in a situation in which he could make that sort of a defense to this deed of trust. He had no lien upon the property, and acquired none by his judgment. He made no levy upon anything. He brings this suit here for the purpose of reaching equities upon the very ground that he has no lien or security for the payment of his judgment, that he is unable to reach any property belonging to the defendant, Barker, by execution, and that it is necessary for him to invoke the jurisdiction of a court of equity in order that he may reach alleged equities belonging to the defendant. This does not place him in the category of a purchaser, so as to enable him to make a question as to priority or preference with parties having liens antecedent to his commencing this suit. It is simply a question whether the claimed lien of Bradley is such a lien as should be maintained by a court of equity under the circumstances. If so, then it is superior to the claim of the complainant, who has not yet acquired a lien, but seeks to obtain one by a decree in this case.

This deed of trust was executed for Bradley's benefit to secure the debt of the husband, although the wife executed her note at the request of her husband. This is very analogous to the instance of the agent executing his note to secure the actual debt of the principal, in which case the creditor may hold either or both for the debt. Equity will, when the circumstances seem to require it, disregard the form in which the parties may have chosen to clothe their transaction, and look to the real status established by the evidence.

In this case it is, in our judgment, established beyond all question that the defendants, Barker and wife, executed a deed of trust upon the equity of redemption in premises really belonging to Barker, to secure the payment of money to Bradley really owing by Barker to him. As the evidence shows Bradley to be a *bona fide* creditor without knowledge of any fraudulent purpose on the part of Barker in conveying this property to his wife, and that he in good faith accepted the deed of trust as a security for the payment of his debt, we are of the opinion that he is entitled to a lien paramount to the complainant, who has no lien nor right to have the property appropriated to pay his claim, beyond that which the court may give him in this case. Bradley has the elder, and therefore the better equity, and for this, if no other reason, must prevail.

Had this property not been sold, the right of the complainant would be subject to the three prior liens or incumbrances growing out of the execution of these three deeds of trust, to have the property sold and the money appropriated, first, to pay off these three incumbrances; secondly, to have the residue, if any, applied to his judgment. But as the property has been sold, this becomes a litigation for the residue of the fund left after satisfaction of the two first deeds of trust. As the satisfaction of Bradley's lien will exhaust the residue of the fund, the proper decree in the case is to dismiss the complainant's bill.

The decree of the court below will be affirmed.

WILLIAM C. DEWALT
vs.
PATRICK DORAN ET AL.

EQUITY PRACTICE; FRAUDULENT CONVEYANCE; CONSIDERATION;
INTENT; ANSWER.

1. When two defendants file papers purporting to be their respective answers to a bill in equity, but each defendant signs and verifies, not his own, but the paper purporting to be the answer of the other, the bill may be treated as unanswered.
2. In a suit in equity to set aside a conveyance as fraudulent, if defendant's attorneys who drafted the conveyance refuse to answer a question as to whether the deed was not prepared in order to avoid the effect of a judgment, such refusal is a suspicious circumstance.
3. A false statement of the consideration for a transfer tends to deceive creditors, and is a badge of fraud.
4. If the consideration for an alleged fraudulent conveyance is promissory notes having an unusual time to run, such circumstance would be a badge of fraud.
5. When circumstances exist raising a doubt as to the fairness of an alleged fraudulent conveyance, the vendee must prove an adequate consideration.
6. The omission of the grantee in a suit to set aside an alleged fraudulent conveyance, to testify, or to produce the debtor or any other important witness, is the ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the question of fraud.
7. In such a suit the defendant should produce all the proof that may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud. Such proof is vital to uphold a transaction in other respects surrounded with suspicion.
8. If the grantee in such a case has knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or has the means of knowing such fact by the use of ordinary diligence, he will be chargeable with notice, and such circumstances are equivalent to actual notice, in contemplation of law.
9. It is not necessary in such a case that the debtor and the grantee shall be actuated by like motives, to cheat and defraud the grantor's creditors. If with such knowledge of facts as would put a prudent man on inquiry, or leave him to infer a purpose to hinder, delay or defraud creditors, the grantee purchases because he considers the property cheap, and this is the only motive that induces him to purchase, or because he desires to save a debt due to him by the grantors, the transfer is nevertheless fraudulent.

10. The only proof usually attainable in an action to set aside a deed as fraudulent, is derived from the assembling of a variety of incidents, each perhaps trivial in itself, but which, by an induction of particulars, may suffice to bring conviction to the minds of the court. These must together amount to proof so as to satisfy the conscience of the court, because the presumption is in favor of the validity of the deed; but when these suspicious circumstances on the part of the grantor have been shown, and the grantee, with means of proof in his own hands, refuses or neglects to say a word to satisfy the conscience of the court and relieve himself from the charge of turpitude, the only possible conclusion is against the fairness of the transaction.

Equity. No. 11,642. Decided November 7, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Rehearing on petition of complainant, of appeal by defendants from decree of special term setting aside deed. *Decree of special term affirmed with modifications, and former decree of General Term annulled.*

The facts are stated in the opinion.

MESSRS. CHARLES BENDHEIM and W. K. DUHAMEL for complainant.

MESSRS. H. W. GARNETT, D. S. MACKALL, A. A. BROOKE, and GARLAND & MAY for defendants.

Mr. Justice HAGNER delivered the opinion of the Court:

This case was argued at a prior term of this court, which then reversed the decree of the court below, directing that the deed executed by the defendant Doran to the defendant Stewart should be set aside because of its fraudulent character. There was little doubt, as I understand, in the minds of the judges who sat in the case that the proceeding was an extremely suspicious one, and that the deed was probably fraudulent, but they were not prepared to declare the evidence then presented was sufficient to require a decree to that effect.

The case has been heard anew at this term, and we have examined it with great care. Some matters not then presented or much considered have received further attention, and we have all come to the conclusion that the decree be-

low was correct, and that the former judgment of this court ought not to stand.

The bill alleged that the complainant, on the 14th of November, 1888, recovered a judgment in the Circuit Court against Doran for \$650 and costs; that a writ of *feri facias* was issued on which only \$66.98 was made on execution, and as to the residue the return of *nulla bona* was made; that Doran at that time was in possession, as he had been for a long time previous, of the land described in the bill; that, in November, 1887, after the suit at law was commenced, he had executed a deed of trust to the defendant building association, to secure \$1,500 borrowed by him; that after the verdict had been rendered against him in the Circuit Court, Doran executed the deed of the property complained of to the defendant Stewart for the alleged consideration of \$600; that Stewart took no steps to have the title of the property examined, as any prudent *bona fide* purchaser would have done; that Stewart was an intimate acquaintance and associate of Doran, and was well aware of the rendition of the verdict against Doran, and of the fact that Doran intended by that deed to convey the property with the purpose to hinder, delay and defraud the complainant in the collection of his judgment, and that the property was conveyed to Stewart upon a secret trust; that ever since the conveyance Doran has been in the possession of the property, using it as his own, and has been paying money to the building association upon the deed of trust which he had previously executed, and that the purpose of the entire proceeding was to defraud and cheat the complainant. The bill contained very searching interrogatories in the exacting terms of the older forms, demanding that specific answers should be made by the two defendants according to the best and utmost of their several and respective corporal oaths, and concluded with the prayer that the deed should be set aside as fraudulent.

The dates are of importance. The suit at law, commenced on the 11th of December, 1886, was an action for

false imprisonment brought by the plaintiff against the defendant Doran. The defendant Doran in his answer to this bill, in speaking of this judgment, declares he does not now owe, and never did owe, a single dollar to the plaintiff on that judgment, or in any other way; that the plaintiff's claim was fictitious and he, the defendant therein, was altogether innocent of the charges therein made and should be so considered, notwithstanding the verdict found by the jury and affirmed by the court.

In less than a year after that suit was brought, and after issue had been joined and when a trial was imminent, Doran executed this deed of trust to the building association. There is no explanation given why he, who up to that time had been apparently in prosperous circumstances, should then find it necessary to encumber his property to the extent of \$1,500. On the 14th of November 1888, judgment was given on the verdict, and on the same day a motion for a new trial was interposed. It is particularly alleged in the bill, and appears from the evidence, that Doran procured a promise from the plaintiff's counsel that no execution should issue on the judgment until the motion for a new trial should be disposed of and that motion was not decided until January, 1889; but just before that time, while the counsel were still withholding an order for an execution in compliance with their promise, they discovered that on the 28th of November, 1886, only fourteen days after the judgment had been rendered, this deed was executed to Stewart. The deed recited that in consideration of \$600, in hand paid to Stewart by Doran, all the right and title of Doran was conveyed to Stewart subject to the charge upon the property of \$1,500 due to the building association which Stewart stipulated to pay. That deed was recorded on the 30th of November, and on the 20th of February following the present bill was filed. Doran and Stewart neglected to answer, and a decree *pro confesso* was obtained against them in March. That decree was stricken out and their answers were filed on the 2d of April, 1887, to which exceptions were at once filed for

insufficiency in various respects. On the 8th of May counsel who had filed these answers, and who had defended Doran in the suit at law, withdrew from the case. Nothing further was done, although there was a motion made to compel Doran to employ new counsel, until June 1889, more than a year afterwards, when new answers were filed in their behalf.

When the case was before the court at a former term much reliance was placed, as we see from the briefs, upon the assumption of fact that in the answers each of these defendants had sworn away the equities of the bill. An examination at the present hearing of the first so-called answers disclosed that they were never entitled to be considered as answers at all. The paper which was filed and relied on as the answer of Patrick Doran to the original bill we find was never signed or sworn to by Patrick Doran at all. It is signed and sworn to, in fact, by Thomas W. Stewart. The answer which is entitled and purports throughout to be the answer of Stewart in a similar way was signed by Patrick Doran, and professed to have been sworn to by him. The verification made by the defendants to the wrong papers is not in the form required by the 88th equity rule, but is as far from a compliance with its requirements as it is possible for a verification to be. It is perfectly plain there could be no indictment for perjury against Doran or Stewart on either of these answers, and that these papers were not answers at all. So far, therefore, from the supposed answers having sworn away the equity of the bill, it was not answered at all at that time.

It is stated, however, in argument by the counsel who now represent Doran and Stewart, that complainant's counsel agreed this fatal fault should be overlooked. The opposing counsel deny this was the understanding, but only admit that when the attention of the new counsel was called to this admission, accidental or intentional, they only said the parties might swear to them then, but not consenting to waive the objections to their defects. We are for-

bidden by our rules to notice such verbal agreement. While it is possible the present condition of the papers may have been the result of accident, there is no allegation or proof that such was the case. On the other hand, if these papers had been placed in the hands of these two defendants to be sworn to by them, and they had been afraid to verify their assertions therein, then it would have been a simple and yet not easily detected device to mismatch them, and thus escape the dangerous consequences of false swearing. Whatever may have been the motive, the fact remains that the argument relied on at the former hearing, that the answers had neutralized the force of the complainant's charges, was without foundation. This defect appears not to have been observed by complainant's counsel, who, assuming they were regular in this particular, filed exceptions to the so-called answers upon the ground that the parties had not answered the eleven pointed interrogatories, nor fully answered the general allegations of the bill, and calling for new answers. The attention of the court below not having been called to the defect, the exceptions were examined as if made to answers sufficient in these essentials, and several of the exceptions were sustained, and the defendants were required to make further answer to the general charges of the bill and of several of the interrogatories. The present counsel then filed what were called additional answers, which only professed to answer further to a few of the points, but do not go over the whole case. For example, in the additional answer of Doran, he only professed to respond to the fifth paragraph of the bill and to the sixth and seventh interrogatories, without making any reply whatever to all the rest of the bill. Not a word is said, for example, in reply to the very important averment of the bill, that Doran having determined he would not pay this debt, went in turn to three attorneys of the court, Messrs. Brooke, O'Neal, and Ridout, and endeavored to employ them to help him in the preparation of a deed to avoid the effect of this judgment. The defendant is called upon to answer this charge, but nothing

at all is said in reply, and both the new and the original answers being nullities, the charge is altogether unanswered.

The case then went to the taking of testimony, and the complainant presented all the witnesses he reasonably could. He brought as a witness his counsel in the case to show the promise by complainant's counsel had been obtained by Doran to suspend execution upon the judgment, under the pretext that if they would wait until a decision had been made upon the motion for a new trial Doran, if it should be overruled, would give a satisfactory *supersedeas* bond which would secure the debt; and that he took advantage of this interval to endeavor to get the deed to Stewart prepared, which he hoped would deprive the plaintiff of all chance to realize on his judgment.

Evidence was produced as to the value of the property. Mr. Walker, a real estate agent, who had been familiar with the value of property on Capitol Hill, said the house was worth from \$2,800 to \$3,100. Though this testimony is not conclusive, it is quite enough to show it was worth more than was assumed to be its value when Stewart professed to buy it. There was then from \$1,200 to \$1,300 due to the Association on the property, and Stewart claimed to have paid \$600 additional, making \$1,900, instead of \$2,800 to \$3,100, a difference of at least one-third, which was very considerable in view of the small amount involved.

Two of the lawyers named in the bill were examined by the complainant, and asked whether the charge in the bill as to Stewart's application and their refusal, was correct. The transaction with which O'Neal was concerned was an attempt by Doran to get O'Neal, as a lawyer, to arrange some way by which the small amount of his personalty which had been taken on the execution, amounting to \$66.98, might be considered as the property of a Mrs. Hill. When asked whether he looked upon the whole transaction as a subterfuge on the part of Doran to re-invest himself in a part of this property, he answered, that he looked upon the transaction as shady, and advised him against putting this

woman into trouble, by which her little property would go, and advised her not to go on the bond in the case, as the transaction was shady.

When O'Neal and Brooke are asked the distinct question, whether or not Doran did not ask them to prepare a deed for the purpose of avoiding the effect of the judgment, they both declined to answer. The question was certified to the equity court, and the court deciding that they had the right to decline to answer, no further evidence from them was obtainable.

But certain reflections arise when counsel plead their privilege as a reason for not answering such a question. Surely no professional confidence would require silence under such circumstances if the charge was untrue.

The counsel for the complainant then asked Doran to authorize his counsel to answer this question. One word from him would have sufficed to procure valuable testimony in Doran's favor if the transaction was an honest one. He had but to speak one word to enable him to obtain from the attorney absolute proof that the charge in question was untrue; but that word he refused to speak. No one could examine this incident without becoming convinced it is in itself a suspicious circumstance.

That was about all the evidence the complainant could reasonably obtain. He did not run the risk of putting these defendants on the stand; but they themselves had the right to state at length any exculpatory fact, yet they did not see fit to run the risk of going on the stand. Here was a charge against two men, of fraud, conspiracy and collusion to cheat, and with the means of acquitting themselves if they were unjustly accused, they refrained from going on the stand. Would any honest men silently allow themselves to be charged with such fraud, and refuse to testify when they had the means of instantly putting down the slander, if such it were, by presenting themselves as witnesses? Not only did Doran and Stewart refuse to present themselves as witnesses in their own behalf, but no third person in this Dis-

strict is produced to say a word in their behalf. The transaction appears to have been conducted in absolute secrecy without a witness. Doran had resisted at every step the recovery of the judgment for \$600; but he surrendered every particle of his remaining property without consultation with any friend or adviser, as if it were the most unimportant trifle. Although the first so-called answers cannot be considered as evidence in their favor, yet they may be examined and compared as declarations on their part of the transaction. Doran says that at the time of the rendition of the judgment against him he was indebted to divers persons in this District, several of whom held his promissory notes, and that he sold his interest in this property in order to be prepared to meet these obligations, consisting for the most part of notes given for borrowed money, as he had always endeavored to do, believing it to be his first duty to pay back money borrowed of those who had relied solely upon his honesty; and he says said judgment was in no way a lien upon his property.

In the interrogatories he is asked for the names of any persons, creditors of Doran or otherwise, to whom he pretends to have disbursed the money received from Stewart, the amounts paid them and their residences. Here is his full answer: "That he received the purchaser's note for the said sum of \$600." This is no response to the demand to tell who received this money and the circumstances connected with it. In his subsequent answer, his memory seems to have greatly improved, and he says: "And further answering the sixth interrogatory, the defendant says, that with the notes he received in payment for said real estate from said Stewart, he paid a debt to Michael Rady, who resides somewhere in the State of Georgia, his exact residence not being known to the defendants."

Georgia contains only 1,800,000 people, and it is somewhere in Georgia that this man is to be found. There is no production of any receipt of the money from Rady and no evidence whatever of the indebtedness.

He further answers that he paid a debt to John Joy Edson, of Washington, D. C., with one of said notes, amounting to the sum of \$40. Mr. Edson was president of the building association, and he had to pay him as such, money from time to time; but no receipt was brought here to show that it was not an ordinary payment to the building association.

Then he says his co-defendant Stewart took up notes amounting to \$300, and gave this defendant cash for them, and he applied the money to defraying his general expenses, and also to the payment of his notes that had been discounted at the Second National Bank and in the Columbia National Bank of Washington, D. C.; that he indorsed one of said notes, amounting to \$170, to Mrs. L. P. Martin, of Birmingham, Ala., in payment of a debt he owed her, amounting to said sum, and that he now has in his possession one of Stewart's notes amounting to \$50.

Mr. Stewart, in his amended answer, says: "I do not know what disposition the defendant Doran has made of said note. He got me to divide the amount left into several notes, so that he could realize on them, as he told me he needed some money."

If it had been true, as stated by Doran, that his co-defendant Stewart took up notes amounting to \$300 and gave him, Doran, the cash for them to be applied to his general expenses, Mr. Stewart could hardly have said, "I do not know what disposition the defendant Doran has made of said notes," for he would then have known what disposition had been made of \$300 of them at least.

But the most peculiar fact is, there is no testimony or statement (except what these men say in the so-called answers) that there ever was a note given at all by Stewart. The deed says the consideration was cash in hand paid, and the alleged notes are not produced. Those notes which were paid by Stewart should be, undoubtedly, in his possession; and the note which Doran says he paid in Georgia to Michael Rady would either have come back here, or he would have a receipt for the amount. The same is true of

the note said to have been paid to Mr. Edson, and of those said to have been paid to the Second National Bank and to the Columbia National Bank, and to Mrs. Martin; and yet there is not the scratch of a pen of any description on the subject.

The same contradiction appears as to knowledge of the judgment on the part of Stewart. In the first answer Doran says the judgment was not in any way a lien upon the said property. In this he agrees with his counsel here, who argued that a judgment could not be rendered until after the motion for a new trial was overruled; but the docket shows, as is our practice, that the judgment was entered on the 13th day of November instantly on the rendition of the verdict. Doran says he does not know whether the defendant Stewart knew of the exact condition of the litigation between himself and the complainant, but he satisfied himself the title was good, subject to said incumbrance to secure the building association.

Mr. Doran, in his answer to the eighth interrogatory, first says: "The defendant, Mr. Stewart, knew that I had or was having some litigation with the complainant at the time he purchased said property from me. He made his own inquiries about the matter, and can best answer as to the extent of his knowledge."

As they were in the same room in the same office, and there seems to have been no one between them and they seem to have been intimates, of course there can be no doubt that Stewart really knew all about the matter.

Mr. Doran, in his further answer to the bill, says: "Further answering, the defendant says that his co-defendant Stewart was not aware of the rendering of any judgment in favor of DeWalt against this defendant, to his knowledge, at the date of the purchase of the real estate mentioned in the complaint."

Stewart's statement is of importance in this connection. In his first answer, he stated that he had no personal knowledge as to whether the judgment referred to against the

said defendant Doran had been rendered at the time or not; but that he was advised there was no lien on the said property by reason of the said litigation, at the time he purchased the same from the defendant Patrick Doran.

Again, in answer to the interrogatories, he says: "I had no personal knowledge of the result of the litigation between the complainant and defendant Doran, but heard that the complainant had gotten a verdict against him for the amount claimed in his bill of complaint, but was satisfied that no lien by reason thereof had been obtained as against the property described in said bill, and that I would get a good title thereto."

When he is required to answer again, he says: "At the time of the conveyance of said real estate to him by Patrick Doran he was not informed or aware of the existence of any judgment against Doran in favor of the complainant."

It seems to us that in these most important points in the case such circumstances of suspicion against these parties appeared as made it absolutely incumbent upon them to adduce proof of the consideration satisfactory to the court, and also to show that Mr. Stewart had no knowledge or notice of the existence of the judgment, and that he knew of no facts from which a reasonable man would reasonably deduce the idea that his object was fraudulent in parting with everything he had in the world at that time.

There are some principles applicable to this case deserving consideration.

The deed alleges the consideration is cash, not notes. It is spoken of in one of the answers, which may have been a verbal inaccuracy, as a note received from Stewart.

A false statement of the consideration for a transfer tends to deceive creditors, and is a badge of fraud. (Bump on *Fraudulent Conveyances*, 42.)

There is nothing to show the time the notes were to run. If an unusual time was given it would be a badge of fraud (Bump, 47), and we should be informed upon the point.

When circumstances exist raising a doubt of the fairness

of the transaction, the vendee must prove an adequate consideration. The transaction is scrutinized more closely, and the same disparity is not required as in controversies between vendor and vendee. (Bump, 44.)

As laid down in a very recent case by the Supreme Court (Crawford *vs.* Neale, 144 U. S., 559), the burden is on the attacking creditor; but where the fraudulent intent on the grantor's part is made out, and the circumstances are suspicious, the purchaser must show that he paid full value, and if he does it must then appear that the purchaser had notice of the fraud.

The omission of the grantee to testify, or to produce the debtor or any other important witness, is the ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the question of fraud. (Bump, 52, 53.)

When the fraudulent intent of the grantor is shown, it is incumbent upon the grantee to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power.

The facility with which fictitious payments may be fabricated renders it necessary for him to produce all the proof that may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud. Such proof is vital to uphold a transaction in other respects surrounded with suspicion. (Bump, 53, 54.)

Where the grantee, without any notice or knowledge, or reasonable grounds for suspicion of *mala fides* on the part of the grantor, purchases property for a fair price, fraud of the grantor cannot impugn his title. On the other hand, if the grantee has actual notice of the grantor's fraudulent intent, of course the transfer is void, however honest may have been the purpose of the grantee. "It is not necessary that the grantee should have actual knowledge of the debtor's intent to delay, hinder or defraud his creditors, to render the transfer void. A knowledge of facts sufficient to

excite the suspicions of a prudent man and to put him on inquiry, or to lead a person of ordinary perception to infer fraud; or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge in contemplation of law—*res ipsa loquitur*." (Bump, 20.)

It is not necessary the debtor and the grantee shall be actuated by like motives, to cheat and defraud the grantor's creditors. The motives and intentions of the grantor and grantee may be different. If with such knowledge of facts as would put a prudent man on inquiry, or leave him to infer a purpose to hinder, delay or defraud creditors, he purchases because he considers the property cheap, and this is the only motive that induces him to purchase; or he buys because he desires to save a debt due to him by the grantor, the transfer nevertheless will be held fraudulent.

In *Zimmer vs. Miller*, 64 Md., 300, the following language is used:

"In order to justify the annulment of a deed it is therefore necessary to prove a fraudulent intent, and here an apparent difficulty is interposed; for although the actions of men can be conclusively proven, the motives which lurk in their bosoms and control their actions are not susceptible of positive proof. In most cases fraud must be inferred from facts established by competent evidence. As has been said by the Supreme Court of Michigan, in the very recent case of *Hough vs. Dickerson*, 24 Northwestern Reporter, 812: 'Fraud, like any other fact, may be proved by any facts or circumstances which satisfy the mind by a preponderance of the evidence in any given case of its existence, and many times it is inferred, and properly so, from circumstances, and often cannot be proved in any other way.' As was said by this court, in *Ecker vs McAllister*, 45 Md., 309, 'The intent with which a grantor executes a deed must be gathered from the deed itself, and from his acts and the surrounding circumstances.' It would therefore seem to be an established rule that when those circumstances are

of such a character as to lead to the inference that there has been a fraudulent intent, the *onus* of disproving fraud rests on the parties to the transaction. As the court said in the case just cited, 'Every person of sound mind is presumed to intend the necessary, natural or legal consequences of his deliberate act.' If, therefore, the grantor, knowing that he has creditors, makes a disposition of his entire property, placing it beyond their reach, under such circumstances as appear in this record, it may be presumed that he was actuated by an intent which ought not to receive the sanction of a court of equity; and when he is confronted by this presumption, it is incumbent on him to meet it with counter-vailing proof. . . .

"As Chancellor Kent remarked in an analogous case, 'To rest entirely on the naked assertion of payments, without any proof in support of them, is a circumstance leading to the most unfavorable inferences.'"

The court then refers to the case of *Callan vs. Statham*, 23 Howard, 477, which contains a reliable guide as to the law on the subject. The case, which went from this jurisdiction, was a creditor's bill, filed by Statham and others, to set aside a deed made by Callan and wife to M. P. Callan. Judgments to the amount of \$3,000 had been recorded against Callan. That bill was answered, and the answer, at that time, only stated that the consideration was sufficient, and was paid. A second bill was filed by Sherman, and the suits were consolidated. In the answer to that suit, Callan stated the consideration as \$4,000, and that it was paid by the surrender of a note that he held against the other party, and \$900 cash; and that the payment was not made in the presence of other parties.

Callan was heavily in debt; several suits were impending over him, and maturing to judgment, to which the property in question would have been subject. The conveyance was made to his brother for the consideration stated in the deed, of \$4,900. The premises conveyed, according to the estimate of witnesses who were well acquainted with them,

were worth at the time exceeding \$15,000, assuming the title to be good. The vendor continued to possess and occupy the property after the conveyance, as before, leasing the buildings and collecting the rents in his own name, and not accounting to the vendee for the same. The opinion says:

"No proof was given by the defendants in respect to the payment of the consideration, with a view of sustaining the allegations in the answer. They rely entirely upon the rule of pleading, that the answers are responsive to the bill, and are to be taken as true till overthrown by proof on the other side. As they aver the payment was a transaction between themselves, and the principal part a note held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances, tending to excite distrust and suspicion as to the *bona fides* of the deed.

"But independently of this consideration, there are other facts in the case that may well justify the decree below, the most important, perhaps, the unsatisfactory evidence on the part of the Callans in respect to the payment of the consideration stated in the deed. This proof was vital in order to uphold a deed in other respects surrounded with suspicion. The evidence was in their possession, and their admission that the transaction was secret made the proof still more indispensable on their part. The want of it, under the circumstances, is nearly, if not quite, fatal to the validity of the deed as against creditors. The continuance of the vendor in the possession and occupation and full enjoyment of the premises, the same after the deed as before, and absence of interest in the subject manifested by the vendee, are circumstances not satisfactorily explained; also the heavy indebtedness of J. F. Callan, and suits pending and maturing to judgment—all well known to the vendee."

Nobody can doubt the facts here proved notice to

Stewart as to this judgment, and bring him precisely within the category spoken of by the Supreme Court. What sensible man, talking with Doran, on being applied to to buy this property, knowing that a verdict had been given against him, would have doubted for one instant the object in his mind, in agreeing to put himself out of house and home and become a tenant to another, for no explained purpose? If the property was really worth from \$2,800 to \$3,100, then Doran was giving up (admitting it to be a genuine transaction) the difference between \$1,900 and \$2,800 or \$3,100; and agreeing to pay rent, at the rate of \$16 a month, apparently for nothing at all; that is, he was giving the difference between the real value and the assumed value, and paying rent, for nothing. If, on the other hand, the property was only worth \$1,900, then it was a most extraordinary bargain for Stewart to make. He would then have been paying for the chance of getting this rent hereafter, the interest on the balance due to the building association; besides losing the interest on \$600, and paying taxes on the property, with insurance and repairs,—a most unprofitable and unsatisfactory sort of bargain, one would think; and made apparently without any assigned reason. There is only one explanation of it, and that is that he wanted to help Doran to defraud the complainant.

Another important circumstance must be noticed. Immediately after this judgment was rendered, and before the deed was made to Stewart, Doran went to the building association and applied to borrow more money on this property. He had nearly stripped himself of everything. As soon as he found the suit was going to be tried, he had incumbered the lot for \$1,500. He now wanted to borrow more money from the building association, which they refused to give him. He then went to Mr. Stewart, as he alleges, and the result was the alleged sale for \$600 of every possession he held in the world.

There is a variety of circumstances in the case which I need not mention. We know that when men intend to

cheat their creditors, they do not go to the house-top and sound a trumpet, and call everybody to be present and witness the act; the deed is done in silence and in secrecy. Some confidential friend is found, and the parties select their own time and manner of accomplishing their object.

The only proof usually attainable is derived from the assembling of a variety of incidents, each perhaps trivial in itself, but which, by an induction of particulars, may suffice to bring conviction to the minds of the court. Of course, these must together amount to proof, so as to satisfy the conscience of the court, because the presumption is in favor of the validity of the deed; but when these suspicious circumstances on the part of the grantor have been shown, and the grantee, with means of proof in his own hands, refuses or neglects to say a word to satisfy the conscience of the court, and relieve himself of the charge of turpitude, there can be but one conclusion.

We think on the strength of numerous cases of the highest authority, we are fully justified in affirming the decree below and setting this deed aside. We will sign a decree annulling the former decree of the General Term which reversed the decree below. There are some matters in the decree below which do not seem to us to be exactly right; but there will be a decree signed annulling the deed as fraudulent and void, and giving a right to the party to have the property sold for the payment of his judgment and costs.

WILLIAM E. HODGE

vs.

ROBERT MASON.

PROMISSORY NOTE; CONSIDERATION; PATENT RIGHTS; AFFIDAVIT
OF DEFENCE.

1. When the payee of a promissory note, the consideration for which was the sale of an alleged invention, sues the maker thereon, and the affidavit of defence discloses the fact that the Patent Office had decided the alleged invention not to be patentable, the consideration fails, and judgment under the seventy-third rule will be refused.
2. The seventy-third rule is not intended to operate as a trap, and an affidavit which sets up a valid defence, though inartificially drawn, will be sufficient.

At Law. No. 32,205. Decided November 7, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by the defendant from a judgment for the plaintiff for want of a sufficient affidavit of defence.
Reversed.

The facts are stated in the opinion.

Mr. THOMAS M. FIELDS for defendant (appellant).

Mr. J. W. COOKSEY for plaintiff (appellee).

Mr. Justice JAMES delivered the opinion of the Court:

This is an action by the payee on a promissory note. The plaintiff obtained a judgment under the Seventy-third Rule, on the ground that the defendant's affidavit did not set out sufficiently a defence. The affidavit was in the following words:

"That on or about the 9th day of June, A. D. 1891, the plaintiff, claiming to be the owner of an interest in an alleged invention in galvanic batteries, for which application for letters patent of the United States had been made, by repre-

senting the same to be of great value, influenced this defendant to purchase a small portion of said plaintiff's interest for the nominal sum of one thousand dollars, for which amount the note described in the said declaration was given. That said note was given with the understanding and belief that it was not to be negotiated, and that it was to become due and payable only at the instance of this defendant, or when said alleged invention was patented and funds had been realized therefrom.

"That said alleged invention has not been patented, and the most important claims have been refused protection for want of novelty and patentability under the laws of the United States. That said note was given without consideration. That the consideration thereof has wholly failed, and further, that prior to the institution of this suit, defendant tendered to the plaintiff a re-assignment of the interest in the said alleged invention acquired by him, as aforesaid, and requested a surrender of the said note, but plaintiff refused to accept said re-assignment, or to surrender said note. That the plaintiff is not entitled to recover the whole or any part of the sum claimed in his said declaration."

Clearly this affidavit of defence is inartificially framed, but it discloses that this note was given for an invention for which a patent had been demanded, and that such patent had been refused. Now, it is said that an invention is a valuable consideration; that many inventions are of great utility, and that the mere fact that this is not patentable is no objection to the value of the invention itself. I know of no way in which an invention in which the whole world participates can be of any special value. There is no secrecy when the application to the Patent Office is made and the invention is disclosed. It is not comparable, therefore, to that kind of cases.

We find that enough is disclosed to show that it was sold as an invention, and that the Patent Office, authorized to decide such questions, subject to appeal here, has decided that there was in this case *no invention*, for that is the effect of refusing a patent.

Enough, therefore, is disclosed in this affidavit of defence, to show that the consideration of this note was the sale of an invention, which the Patent Office decides not to be an invention, and the alleged consideration has failed.

We have remarked that the statements here are not very artificially made, but we conceive that this seventy-third rule is not intended to operate as a trap. When we find a sufficient indication of a defence, we think it is the proper administration of the rule that the case should go to the jury. It is not so obligatory that judgment should be rendered for the plaintiff whenever the defendant makes an affidavit containing any defects.

We find on the face of these papers sufficient evidence that this should have gone to the jury and the question of the invention or non-invention allowed to be shown there.

We therefore feel constrained to *reverse the judgment that was granted under the seventy-third rule.*

ROBERT J. HOLLOHAN

vs.

THOMAS E. YOUNG.

MECHANICS' LIENS; JURISDICTION.

1. The Supreme Court of the District of Columbia has jurisdiction in equity suits brought to enforce mechanics' liens, notwithstanding the amount involved may be less than \$50.
2. Neither Section 769 R. S. D. C., nor the Maryland Act of 1777, Ch. 41, which is in force here, controls such a case, but the proceedings are governed by the act of July 2, 1884 (1 Rich. Supp., 447-449).
3. Any inconvenience which may arise from the prosecution in equity of such petty claims under the Mechanics' Lien law, cannot interfere with the duty of the court to enforce the clear right given to the suitor.

Equity. No. 12,464. Decided November 7, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by the complainant from a decree dismissing a bill of complaint. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. W. P. WILLIAMSON for complainant (appellant).

Mr. J. J. JOHNSON for defendant (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This case, which was submitted without any argument or explanation, presents an interesting question as to the jurisdiction of this court in cases for the enforcement of mechanics' liens. The complainant gave notice of his lien and filed a bill with apt averments, alleging he was a sub-contractor; that he did work on defendant's stable, upon which the balance claimed was still due; and that the principal contractor gave him an order on the defendant which the defendant refused to pay because as he said, the contractor had left the work, and had been fully paid for all the work he had done.

The testimony taken in the case, all of which was adduced by the complainant, thoroughly supports the allegations of the bill, showing that the claimant, upon the defences raised by the answer was entitled to recover. A decree was passed dismissing the bill, upon the ground, as we were induced to suppose, that the amount claimed which was only \$28, is beneath the jurisdiction of the chancery court.

This objection could only be based upon some special statute passed by Congress affecting the jurisdiction of this court, or upon some general principle of chancery practice to which we have fallen heir from the Maryland courts. The only provision on the subject in the Revised Statutes which could be held to be applicable is section 769, which declares: "The justices of the Supreme Court shall not hold original plea of any debt or damage in cases within the jurisdiction given to justices of the peace, which shall not

exceed \$50, exclusive of costs." We think it clear this section does not apply to mechanics' liens. The litigations in which the court is forbidden to hold original plea are described as cases "of debt or damage within the jurisdiction given to justices of the peace." As no authority is given to justices of the peace in section 997, which is the chart of their jurisdiction, or elsewhere, to interfere at all in proceedings to enforce mechanics' liens, we think those proceedings are quite without the operation of section 769.

Neither are they within the limitation imposed upon the Chancery Court of Maryland, by the act of 1777, chapter 41, in force here. That act provided that "His Majesty's Court of Chancery within this province shall not hear, try, determine or give relief in any cause, matter or thing, wherein the original debt or damages doth not amount to twelve hundred and one pounds of tobacco, or five pounds and one penny in money"—which, according to the rules for reducing tobacco to our currency, would amount to a little more than \$20. (*Reynolds vs. Howard*, 3 Maryland Ch., 333.) This provision could not control the present case because the amount here involved is \$28; but as it may be important in other cases, it is proper to say we think the statute has no application to the special authority to enforce mechanics' liens superadded by the act of Congress, to the general jurisdiction of chancery.

The statute first giving authority to enforce mechanics' liens was not passed until 1859, and the present law, chapter 143 of 1884, sections 2 and 5, states distinctly that "the proceedings to enforce the lien created by this act must be by a bill in equity," etc.

This is clearly an additional jurisdiction outside of that to which the court was entitled when the legislature passed the act of 1777, ch. 41.

In the original law of 1859, found in section 692, authority is given to the claimant to file a notice of lien against buildings, land and other property, etc., only "when the amount exceeds twenty dollars." In the present law that limit is

omitted, which plainly evinces a legislative intention that thereafter there should be no limitation as to the amount required to give jurisdiction.

The inconvenience which may be suggested as likely to arise from the prosecution in equity of such petty claims under the mechanics' lien law, cannot interfere with our duty to enforce the clear right given to the suitor. However insignificant the amount, it may be very important to the claimant, and he must have his rights whether his claim is small or large. The supposed inconvenience might be somewhat controlled by the action of the court. Although it may be compelled to give a decree for the sale of the property to pay a very small sum, it would still have control of the question of costs, and if there should appear to be a disposition to harass a debtor by needlessly instituting such proceedings and thus take a vexatious advantage of the power given by this law, it would be within the competency of the court to impose the costs on the gaining party.

This decree is reversed, and the cause remanded for further proceedings.

After the foregoing opinion was delivered, the solicitor for the defendant filed a petition for a rehearing, which the court in an opinion handed down November 14, 1892, refused to allow. On this petition Mr. Justice HAGNER delivered the opinion of the court:

In the case of Hollohan against Young, which was decided last week by this court, an application has been made for a re-argument. The petition for a rehearing sets forth that the case was submitted, by consent, and after due consideration by the court a decree was made reversing the decree of the court below; that this court reversed the decree of the court below on the question of the amount of money necessary to give jurisdiction to the equity court. The petition then sets forth:

"Third. The point upon which it is respectfully urged

for a rehearing is that the evidence in the case manifestly shows collusion between the complainant and the contractor to mulct the defendant in damages to the extent of the sum claimed by the complainant; and as this point was not decided by the court, it is respectfully submitted that the court will, upon consideration of this petition, grant a rehearing. The evidence to establish such collusion, as above stated, is apparent in the record."

It is quite apparent that counsel who prepared this petition could not have heard what was said by the court in its opinion. The case was submitted to us without argument, and without any intimation as to what was the trouble. So far from the case not having been examined, there was not one syllable in it, from the first word of the petition to the last word of the decree, that was not read carefully by the court. We were utterly at a loss to know what the difficulty was. As I stated the other day, the case was without difficulty, so far as the indebtedness of the complainant to the defendant was concerned, and as to the right of the complainant, on the face of the papers, to a lien. Then we observed that the amount of the claim was only \$28; and as this question about the jurisdiction of the court had been repeatedly brought up in other tribunals, it occurred to us this was the real question intended to be raised. After some inquiry, we came to the conclusion this was really the ground of the appeal; and therefore we examined and decided that point.

We have again read the whole case. The petition is in the usual form, alleging the work by the complainant, as a sub-contractor, and that this balance was due; that an order had been given by the sub-contractor upon the owner, and the owner had not paid it. He said he did not know whether the work was done or not; that he never knew Hollohan and never employed him; and never saw him on the building; that the contractor did not complete the work, but left it before it was finished; that he paid the contractor for all the work he had done on the building. That idea of

collusion never made its appearance in the case until the complainant, on cross-examination, said that besides working for Scott the contractor on this stable, he also worked for him on other property on Callan street, and elsewhere. Then follows an examination, the purpose of which was, apparently, to show that the contractor Scott might have endeavored to pay the debt which he owed to this complainant for work elsewhere, by putting it on the defendant Young. But such a pretence as this must be supported by evidence. There were four witnesses examined, all on behalf of the complainant, and no one on behalf of the defendant, who did not testify in the case, and not a syllable of evidence exists which can establish any such pretence. Two of the witnesses for the complainant are fellow-workmen, and they simply say that they know the defendant did the work; one of them kept the time of the men employed, and both testified they know this balance is due.

When the complainant testified, upon the claim of collusion, he was asked: "The \$28 which you charge against Mr. Young's building, was that for work done there wholly, and nowhere else?"

(Objected to by Mr. Johnson, because witness should have given this testimony in chief, and not on re-direct testimony.)

"A. Yes, sir."

Then follows the testimony of the two fellow-workmen of the defendant, and finally the testimony of Scott, the contractor, who says in three places that this \$28 is due for work done on this stable; that he had paid him everything for all other work, and that this charge had no sort of connection with the work on any other building. He testified:

"I left the \$28 to be collected by a lien on Young's property, and paid him for everything else he did for me after that. During the erection of the stable, I did tell Mr. Young, at the commencement of the work, that I did not owe the men anything. I exhausted all that I had. It would take more than \$28 to complete the stable."

We have no hesitation in expressing the opinion the case was properly decided before; and we overrule the motion for a re-argument. Counsel for the complainant will prepare a decree declaring a lien and judgment, and allowing the sale, if necessary to make the money, and we will sign it.

E. C. JORDAN, JR., ADM'R OF E. C. JORDAN,

vs.

D. F. HAMLINK AND ELLEN HAMLINK.

' DESCRIPTION OF REPRESENTATIVE CHARACTER; DEMURRERS.

1. The character in which a plaintiff sues is sufficiently stated in the words: "The plaintiff, A., administrator of B., deceased, sues the defendants, etc." It is not necessary for an administrator in his declaration to state from what court he received his letters of administration.
2. The rule of this court which authorizes the bringing on of a demurrer for argument on five days' notice is not invalid; *overruling* Knoedler vs. Meloy, 2 MacA., 240.

At Law. No. 31,841. Decided November 7, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by the defendant from a judgment by default in favor of plaintiff. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. WM. A. MELOY for defendants (appellants).

Messrs. CLARK and JOHNS for plaintiffs (appellees).

Mr. Justice JAMES delivered the opinion of the Court:

The plaintiff sues in his representative character, which he states in these words: "The plaintiff, Edward C. Jordan, Jr., administrator of Edward C. Jordan, deceased, sues the defendants," etc.

The defendants demurred on the ground that this was

merely a *descriptio personæ*, and was not a proper averment of his character.

Rule 129 provides that: "The special character in which the plaintiff sues shall not be considered to be in issue or necessary to be proved, unless by specific plea under oath as to the truth thereof, the same be denied."

We are of opinion that the character of the administrator is sufficiently stated as the character in which he sues. It was not necessary that he should state by what court he was appointed administrator; and we think that the objection that he may be an administrator appointed in Virginia could not even be taken, because, *non constat*, that the deceased had not assets here. At all events, his character is sufficiently stated.

The ground of the demurrer, therefore, is not sound.

Another objection, however, is made. The defendant demurred, not in form, but to his demurrer being heard when it was heard. He did not propose to have his case come to issue any sooner than it must. He refers to Sec. 802 of the Revised Statutes as forbidding the consideration of an issue *of law*, without giving ten days' notice by having it put on the calendar, before the case could be called at all. We have a rule that demurrers may be heard at any time on five days' notice. That rule, counsel have argued, is invalid, unless it be construed in this way, that first, the case must be noted for trial on the trial calendar ten days before it is called, and then after that it may be called up and still further hastened by a notice that it will be heard within five days.

It was held in the case of *Knoedler vs. Meloy*, 2 MacArthur, 240, that such was the proper construction of the statute. Mr. Justice MacArthur, delivering the opinion of the court, said:

"By reference to the statute, it is clear that issues of law are the subject of trial. The language of the act is, 'Issues of law may be tried at a circuit court or special term.' And again, 'At any time after issue, and at least ten days before the sitting of the court, either party may give notice of trial.'

"It is also provided that a note of issue shall be furnished to the clerk in order to enter the cause upon the trial calendar, and this is plainly as applicable to issues of law as to issues of fact. By the express words of this section, therefore, an issue of law can only be tried upon a notice of ten days before the term, and having the cause regularly placed upon the calendar by the clerk. This is in exact conformity to the practice prescribed in rules 42 to 47, inclusive, which were in force at that time. When there is an issue of fact as well as of law, one notice will be sufficient, and of course it will generally be expedient to have the demurrer disposed of first. That a joinder in demurrer produces an issue of law cannot now be a matter of any doubt, and the practice in regard to noticing it for trial and entering it upon the calendar of the court where the cause is pending, must be the same as in cases in which there is an issue of fact. Rule 47, recently adopted, as far as it contravenes the statute in this respect, is inoperative and void.

"The record in this case shows that the plaintiff joined issue to the demurrer on the 12th of November, 1874, and gave a two days' notice of argument. The cause had never been entered on the calendar. Upon this notice, and in the absence of the defendant, the plaintiff obtained the order of the court overruling the demurrer. We think the plaintiff could not proceed to argument or trial without having given notice at least ten days before the sitting of the court, as is required by the act of Congress; and the court ought to have set the order aside for this irregularity. The point is not of practical importance in this case, for the court below set the order aside, and allowed the defendant leave to plead as advised. The construction we have put on the statute and rules of court relate, however, to an important point in practice, which ought no longer to be left in uncertainty. We have, therefore, passed upon the point."

It will be observed that the point was not material to the decision of that case. We have noted also that although it was made in the brief, it does not appear to have been fully

argued, or perhaps argued at all. For that reason we feel more at liberty to consider the propriety of the decision, inasmuch as we think that it was substantially *obiter dictum*. It was an attempt of the court to settle what they understood to be a troublesome point, a matter of some doubt to them, without being called upon necessarily to do so.

We are obliged to say that we differ from that decision. The language of the statute was, in section 7—I should observe that I recur to the original statute, instead of the Revised Statutes:

“Sec. 7. All issues of fact triable by a jury or by the court shall be tried before a single justice; when the trial is by jury, at a circuit court, and when the trial is without a jury, at circuit court or special term. Issues of law may be tried at a circuit court or special term. At any time after issue, and at least ten days before the sitting of the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least four days before the sitting of the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon a calendar, according to the date of the issue.”

It was observed by the court in the case to which I have referred that the language of the statute is that “Issues of law may be tried.” That is a correct enough expression; but the word “trial” is a technical word, and when it is provided that “at any time after issue, and at least ten days before the sitting of the court, either party may give notice of trial,” we apprehend that that is applicable to what is known as a “trial” technically. It is true that the word “trial” is applied to a question of law, but technically that is not a trial.

We take this sharp distinction because we conceive the rule as interpreted to be mischievous. It is desirable that a demurrer shall be heard as early as possible; and it can hardly be supposed that it was the intention of the Legisla-

ture to postpone an objection, that no action was stated in the pleading, any longer than it must be postponed. There is no object in requiring that that issue shall be laid aside until one or other of the parties shall give notice that it is to be heard. It prolongs proceedings, and such a construction of the intention of the Legislature should not be adopted unless it must be.

We find, then, that there is a want of that particularity in describing it as a trial which relieves us from the necessity of saying that this issue must be noticed ten days before the sitting of the court.

We find that several unconnected subjects are mentioned in this section. The reviser separated them. I take pleasure in reminding the bar once more that although I was one of the commissioners to revise the statutes, I had nothing to do with this revision. Section 801 was, "All issues of fact triable by a jury or by the court shall be tried before a single justice." Then in the next subject he grouped these: "Issues of law may be tried at a special term." "At any time after issue and at least ten days before the sitting of the court, either party may give notice of trial."

The effect of that mode of dividing the subjects was to group the latter as being on one subject while the provision in section 801 related to another subject. We find that several subjects *not necessarily connected*, were provided for in section 7 of the original statute; and as the Supreme Court has several times said, whenever there is any question of construction by reason of the collocation of subjects in the Revised Statutes, or arising from a change of language, we have the right to go back to the original statutes to ascertain the proper construction.

We find, in this way, that there is no manifest intention to make them all parts of one matter. We are of opinion the rule which authorized the bringing on of a demurrer on a five days' notice is not invalid.

I might remark that in thus overruling the former decision, we are supported by an opinion of the whole court,

pronounced by the very making of this present rule. They felt at liberty to make it, and we conceive that although the judges were not sitting in court, it is a strong expression of opinion on which we have the right to rely.

Mr. Justice HAGNER : I want to say a word in reference to this important matter, as there seems to have existed a substantial doubt as to what should be the proper practice. If that which the plaintiff's counsel in this case insists is the proper one, be so held, the ruling would indeed make the demurrer justify its derivation—a matter for useless delay. If it is indeed true that no demurrer could be heard even on five days' notice unless it had been also on the general calendar for ten days before the sitting of the court, then it would result that any suit brought within those ten days, must of necessity, lie over without ability to hear the demurrer, however ridiculous and faulty the declaration may be, until that term shall have passed. That would be a most inconvenient practice, as it seems to us.

I think a very important consideration is presented by the court with reference to these rules under the decision made in 1875. It was conceded by the justice who delivered that opinion that it was not essential to the decision of the case. It was a mere *obiter*. In 1879, when the rules were revised, the court then explicitly provided that a demurrer might be heard on five days' notice. That remained undisturbed until the new rules in 1886 were issued. Then the rule was changed so as to declare that cases involving issues of law should be placed on a separate calendar, to be called the law calendar, and should then be ready for hearing without notice at such time as may be appointed therefor by the justice. This again was changed in 1888, and the previous provision was re-established, that demurrers might be heard on motion after five days' notice.

These rules have thus thrice been considered by the full court in General Term after that decision. It must have been the opinion of the court that the decision in 2d Mac-

Arthur was not law. We have now all consulted on this subject (those who sat in the case and those who did not), and we are of opinion that the decision just announced contained a just construction of the law.

Mr. Justice JAMES: The bar will observe that this ruling is in favor of the prompt dispatch of business.

ELIZABETH D. BATTELLE

vs.

WILLIAM O. DENISON.

BILLS OF EXCEPTIONS; EXTENSION OF TERM.

1. Where the October Term of the court below was prolonged from time to time, until April 4th (in the January Term), for the purpose of signing a bill of exceptions, and exceptions were not presented on April 4th, but were presented and signed on the 11th of April, seven days after the prolonged term had expired, it was *held* that such bill of exceptions came too late.
2. If a bill of exceptions is without authority of law, this court in General Term is under no obligation to look into the other questions which are raised by the record.

At Law. No. 30,164. Decided Nov. 14, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Motion to dismiss defendant's appeal. *Appeal dismissed.*

The facts are stated in the opinion.

Messrs. R. B. LEWIS and W. W. MOFFITT for the motion.

Messrs. H. B. MOULTON and J. F. FARNSWORTH *contra*.

Mr. Justice HAGNER delivered the opinion of the Court:

This is an appeal from rulings of the special term in a suit brought to recover a sum of money alleged to be due by the defendant, Denison, upon a deceit, on his part, in the sale to the plaintiff, Elizabeth D. Battelle, of certain prop-

erty. The plaintiff alleges that the defendant was acting as agent for one Lewis, and was authorized by him to sell a lot, number 94, for 22 cents a foot; that at the same time he allowed himself to be employed by the plaintiff, Battelle, as her agent, to buy lots for her, and claimed to have bought that lot for her at 30 cents a foot; that a similar transaction took place with reference to another lot, 93, which he as Lewis' agent was authorized to sell at 25 cents a foot, but which he professed to have bought for Mrs. Battelle at 30 cents per foot; that he received from the plaintiff the alleged price of both lots at the rate of 30 cents per foot, paid Lewis the diminished price, and thus defrauded the plaintiff of the difference, which exceeded \$1,000.

The case was submitted to a jury, after a charge of the court, which was very full and fair, extending over eight printed pages, and the jury rendered a verdict in favor of the plaintiff, from which an appeal was taken. A motion is made here to dismiss the appeal upon the ground that the bill of exceptions was signed after the expiration of the term at which the case was tried and of the additional time for which it was extended for the purpose of signing bills of exception.

This judgment was rendered in December 1891, which was in the October Term. In January 1892, just before the beginning of the new term, an order was passed prolonging the October Term until the 23d of January at 10.30 o'clock, for the purpose of signing bills of exceptions, in this cause among others, and adjourning the October Term without day, except as thus prolonged and extended. On the 23d of January 1892, which was within the January Term, in accordance with this order the October Term was opened, but the appellant not being ready with his exceptions, the term was again prolonged for the purpose of settling the exceptions in this case, to the 6th day of February, 1892, at 10.30 o'clock. On the last-named day, the court again met, and the exceptions in this case still not being ready, the court prolonged the October Term until April

4th, 1892, only for the purpose of signing the bill of exceptions. April the 4th came and the bill was not presented. Finally on the 11th of April the appellant presented his bill of exceptions, which was then signed by the judge, under protest of counsel for the plaintiff, noted at the conclusion of the bill of exceptions by the court in this way: "Plaintiff's counsel objects to the signing of this bill of exceptions now, this 11th day of April, 1892, on the ground that it is too late, and the court has no jurisdiction so to do at this time."

The justice, however, signed the bill from a determination apparently to do the utmost justice in the case, and save any rights the plaintiff might have.

We have decided in the case of *Jones vs. Penna. R. R. Co.*, 18 D. C., 426, that it was competent for the court to prolong a term into the next term for the purpose of signing exceptions; and that an exception signed within the time to which it was thus adjourned, although during the next term, was valid.

We subsequently held in the case of *U. S. vs. Bond*, that if the court saw fit, during a new term, to prolong the past term to another day within the new term, it had the right to do so. That is precisely what the justice did in this case. During the October Term he continued it until a day within the January Term, and the two other orders of adjournment were made within that term, the last limit fixed being the 4th of April.

We have never decided the exact point as to whether, if the bill of exceptions were presented after the time to which the term was prolonged, the justice would have the right to sign it.

One would suppose it was hardly necessary gravely to argue such a question, but it happens that in the recent case of the *Michigan Insurance Bank vs. Eldred*, 143 U. S., page 293, this very question came before the Supreme Court, and Mr. Justice Gray, delivering the opinion of the court, said: "After the term has expired, without the court's control

over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." He adds that "any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be."

We are, therefore, under no obligation to look into the other questions raised by the record. The defendants below offered eight prayers, seven of which were rejected by the court, and one of which was granted. We think there is no impropriety in stating we are satisfied no injustice is done by the course we shall take in dismissing this appeal, since we are convinced from our examination of the case, that the rulings of the justice below were right, and the decision of the jury was entirely proper.

Appeal dismissed.

ROBERT A. PHILLIPS

vs.

HENRY J. OGLE ET AL.

TRUST ESTATE; SALE OF EQUITABLE INTEREST; LIMITATIONS;
USURY.

1. Where real estate is conveyed upon trust for the use of a husband until the youngest child should attain the age of 21 years, upon the happening of which event the estate is to be sold and the proceeds divided among the children, each child has a vested estate in remainder, with the same rights and powers as exist in any other case where a vested remainder is created, subject only to the limitations in the deed itself as to the power of alienation.
2. It would be competent for any one of the children in such a case, on becoming of age to sell his interest to a stranger, but the stranger would be bound by the limitations provided in the deed.
3. In such a case, as soon as the youngest child should arrive at the age of 21 years, the estate in the grantee would be precisely like any other estate acquired by devise, inheritance or purchase, and the grantee would be entitled to a sale of his interest.
4. The defence of usury can only be made, either at law or in equity, by the party from whom the usury has been exacted, and cannot be set up in a collateral proceeding; citing with approval *Kendal vs. Vanderlip*, 2 Mackey, 105.

In Equity. No. 13, 196. Decided November 14, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the defendants from a decree for sale. *Affirmed.*

The facts are stated in the opinion.

Mr. J. J. WATERS for defendants (appellants).

Mr. J. C. MARBURY for plaintiff (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

The bill in this case charges that on the 30th day of January, 1857, Joshua Bateman, by his deed of that date, subsequently duly recorded, conveyed certain premises in George-

town, in the District of Columbia, to Judson Mitchell, Charles A. Buckey, and John Marbury, Jr., in trust for the sole and separate use of Ann V. Ogle, during her life, and after her death for the use of her husband, until the youngest child should arrive at the age of twenty-one years, upon the happening of which event the estate was to be sold and the proceeds divided between the surviving children, and the living issue of such as might have died prior to the time fixed by such provision. Ann V. Ogle died in the year 1877, leaving surviving her four children, William F. Ogle, Henry J. Ogle, Bessie B. Ogle and Joseph E. B. Ogle. The last two named were minors, and the youngest, Joseph, did not arrive at the age of twenty-one years until about the 29th of January, 1891.

The complainant further alleges that on the 15th day of January, 1887, he purchased from William F. Ogle his one-fourth interest in said property, and took from him a deed bearing date on the 15th of July, 1887; that on the 27th of April, 1889, Bessie B. Ogle, then married to one Thompson, conveyed her one-fourth interest in said real estate to the respondent, Henry J. Ogle, and that on the 19th of January, 1891, Joseph E. B. Ogle, having arrived at the age of twenty-one years, and being the youngest of the children, conveyed his one-fourth interest in said real estate and trust property to Henry J. Ogle, the respondent; so that by inheritance of one-fourth, and by conveyance of two-fourths, the title to three-fourths of the premises involved in this controversy is now vested in the respondent, Henry J. Ogle, and the title to one-fourth of said property is vested in the complainant.

The complainant further alleged that Judson Mitchell and Charles A. Buckey, two of the trustees named in the deed of Bateman, have departed this life, leaving John Marbury, Jr., the sole surviving trustee. It is claimed that by proceedings in equity cause No. 10,429, and the decree therein rendered, John Marbury, Jr., and Charles A. Buckey, then living, were relieved from any further duty as trustees.

This decree was rendered on the 21st day of November, A. D. 1888, and no new trustee has been appointed in their place.

It is further averred that Henry J. Ogle has occupied, with his family, the said trust estate and premises, and has paid no rent therefor, or made any other compensation to the complainant for the use of the complainant's interest therein; that Henry J. Ogle and the complainant are not able to agree upon terms of sale and division of said estate.

The prayer of the bill is first, for a decree of sale of the property for the purposes of partition, the same being indivisible in kind, and asking that a trustee be appointed to make such sale; second, that after such sale, this cause be referred to an auditor of the court to determine what compensation shall be allowed the complainant by the said Henry J. Ogle for the use and occupation of said trust estate since the youngest child arrived at the age of 21 years.

The respondent, Henry J. Ogle, in answering the third paragraph of the bill, says that the deed therein referred to is incorrectly stated in regard to the trust distribution. The trust estate, it is claimed, was to be sold or conveyed to Ann V. Ogle's children, as they should request, on their majority, upon her death. The defendant admits the fourth paragraph of the bill, but says that the plaintiff should have exhibited his deed, and that plaintiff bought out defendant's brother William for only \$125, with a debt due to plaintiff, a part of which was exorbitant interest.

In answering the fifth, sixth and seventh paragraphs of the bill, the defendant admits the allegations therein contained, and says that the complainant took the deed under which he claims while defendant and his younger sister and brother, both minors, were living with their father, Benjamin R. Ogle, in the house of their deceased mother, the premises in controversy; that their father, who is not a party to this suit, still lives in said premises with this respondent. Said Robert F. Phillips was not related to the family of respondent's mother or father. "This respondent respectfully

denies that said complainant could enter into the family home of Ann V. Ogle, or acquire any right thereto, at the time complainant took the deed from William F. Ogle. And respondent further denies that any stranger, as complainant is, can have any right now to any interest in said real estate or the proceeds thereof." He then prays the right to a construction by this court of the deed exhibited.

The defendant admits the death of Mitchell and Buckey, trustees, and the survivorship of John Marbury, Jr., but he denies that John Marbury was removed as trustee under the deed from Bateman, in 1857. He says that he was relieved as trustee of the personal estate only.

The respondent avers that this proceeding is a useless expense entailed by the behavior of complainant himself, and that he should be taxed with all the costs and expenses thereof. He admits that they have been unable to agree on a division of the estate, or a division of the proceeds. He says that the complainant has demanded of the respondent an exorbitant price for his alleged interest, much more than this respondent has paid his sister and brother, although complainant's title is open to dispute; that on the 17th of January last he made a fair, *bona fide* written request to John Marbury, the surviving trustee under the deed of 1857, to make sale of the real estate in controversy, which is incapable of partition in kind, and there being no vacancy under said deed to fill with a new trustee, and no sale for partition under said deed being valid without a request therefor by this respondent, who might call for a conveyance of the trust estate if he so elected, but that said sale said trustee, John Marbury, refused to make, because of the antagonistic actions of the said complainant, he notifying Marbury that he was not trustee, etc.

He further avers that John Marbury claims title as surviving trustee under the deed of Bateman of 1857, but has not been made a party to this cause; that it was not intended or desired that the home place of Ann V. Ogle, conveyed under said Bateman deed, should be affected by the

proceedings in equity cause No. 10,429, and this respondent alleges that the decree of the 21st of November, 1888, in said cause, has no reference for said reasons, to said place; that Benjamin R. Ogle, who also claims an interest in the home place of his said wife, Ann V. Ogle, under the deed of 1857, has not been made a party to this cause.

The provision in the deed of Bateman conveying this property to trustees as to the trust is as follows:

"If the said Ann V. Ogle shall die in the lifetime of her husband, leaving a child or children under the age of 21, then the said named trustees or the survivors or survivor of them, or the heirs of such survivors, shall, at their discretion, allow such children, being under the age of 21 years, to occupy the said premises until the youngest of them, if more than one, shall have attained such age, and when such child, if only one, or such youngest child, if more than one, shall have attained the age of 21, the said trustees or the survivors or survivor of them, or the heirs of such survivor, shall, at the request and cost of such child or children, either sell the said premises to the best advantage, and pay over or distribute the proceeds of such sale according to the claims of right of such child or children to the same, or convey the same to such child or children in fee by a proper deed. If it should happen that any one of the children of said Ann V. Ogle shall have died before such distribution or conveyance, leaving a child or children, they shall stand in the place of his or her deceased parents, and take the share among them such deceased parent would have taken had he or she survived."

The case is submitted on the bill and answer, and seems to raise a question as to the construction of the provision of the deed of Bateman creating the trust and conveying this real estate to trustees. It is claimed by counsel for the respondent that Phillips could not have acquired title to or an interest in these premises until the youngest child had become 21 years of age, and that the deed of the complainant, Phillips, from William F. Ogle, in 1887, some four

years before the majority of the youngest child, was absolutely void; that it was beyond the power of William F. Ogle, at that time, although he was of full age, to convey the property, upon the ground that it was the intention of the grantor, Bateman, in conveying this property, to provide for a family home for Ann V. Ogle and her husband and children, until the youngest child should arrive at his majority.

It does not appear, either from the bill or answer, that the complainant in any way interfered with the family arrangements, or prevented the carrying out of any of the provisions of the deed of Bateman, in regard to the family of Ann V. Ogle. He simply took his deed and had it recorded. After the death of Ann V. Ogle, in 1877, and after the youngest son had arrived at his majority, and after that son, together with his sister, had conveyed their interests to the respondent in this case, Henry J. Ogle, he then demanded that there should be a sale and partition of the premises. It appears from the answer that the respondent also made a similar demand on the trustees, but owing to the difference of opinion between the complainant and the respondent as to whether the trustee then had the power to sell, the trustee declined to make the sale unless ordered to do so by the court.

Counsel for the respondent seems to rest his position, just recited, with reference to the power of the complainant to make the purchase of the one-fourth interest during the minority of the youngest child, upon the principle decided in the case of *Nichols vs. Eaton*, 91 U. S., 716, and the case of *Hyde vs. Woods*, 94 U. S., 526.

Upon an examination of the case of *Nichols vs. Eaton*, it will be seen that the question there was not whether there might not be a conveyance of an interest of the *cestui que trust* during the pendency of the trust, before its full execution, so that the purchaser might acquire the interest which the *cestui que trust* had in the property; but whether creditors might assume that the *cestui que trust* had such an in-

terest in the trust property as that it might be reached by a bill in equity, and appropriated to the discharge of the indebtedness to creditors of the *cestui que trust* and thereby prevent the intended beneficial execution of the trust. In that case a father made a provision for his son and his son's family by providing that there should be an annuity given to his son, and if the son did not comply with certain conditions he should forfeit the right to his annuity, and the same should thereafter remain for the benefit of his family for a certain period of time. The application on the part of creditors by a bill in equity in that case was during the time this trust was in full force, and when there had been no forfeiture on the part of the family. Under such circumstances, it was held that this provision was one which the original grantor had a perfect right to make. It was his own property, and he had a right to provide for its disposition in any manner he saw fit. He had the right to prescribe terms upon which there should be a forfeiture, and upon which there should be a right of alienation. The Supreme Court, in that case, departed from the rule that has always been held in such cases in England, and laid down a rule which, so far as this court is concerned, is obligatory.

But the case at bar is an entirely different one from that of *Nichols vs. Eaton*. In this case the trust has terminated. The trustees have now nothing to do with the estate except to sell or convey it, if requested to do so. It is obvious that if they were requested to sell by one of the parties in interest, and to convey by another, there might be difficulty, and the only way, in that event, would be a sale and division of the proceeds, by order of the court.

Some differences have arisen between the parties as to the right of the plaintiff and as to the power of the trustee to sell. The trustee therefore declines to sell, unless directed to do so by this court, and the parties have come into court each asking the direction of the court and a construction of the Bateman deed. By this deed, a legal estate was conveyed to the trustees, and an equitable estate in

remainder was granted to the children of Ann V. Ogle, to take effect after the termination of the life estate of Ann V. Ogle, if she died during the life of her husband. This estate was a contingent remainder, to the children then born, open to admit others who might thereafter be born, and was subject to be divested only by the death of one of the children before the youngest child became of age. Even in that event the deed made full provision for the disposition of the remainder. It would go to the children of the child so dying, if any, and otherwise to the surviving children of Ann V. Ogle.

We have no doubt that under the terms of this deed, applying the principle which is established in the case of *Nichols vs. Eaton*, 91 U. S., 716, it would be beyond the power of an adult beneficiary to sell his interest, so as to deprive one of the minors of his right to the enjoyment of the entire estate during the minority of any of them. But having a vested estate in remainder, subject only to the limitation created in the deed itself as to the power of these parties to alienate the estate, and subject only to the implied conditions against alienation because of the fact that the estate was to remain intact for the use of the family until the youngest child became 21 years of age, the power and right of these remaindermen were precisely the same as in any other case where a vested interest in remainder is created. The law generally is that whether the estate be legal or equitable, the party holding the equitable estate, if of full age, may mortgage or sell his equitable interest to a stranger as well as to his *co-cestui que trust*, unless there be some limitation in the instrument creating the trust.

The only limitation in this deed is that which was fully satisfied upon the youngest child arriving at its majority, leaving the parties at full liberty to alienate and dispose of the estate as they might think proper, after that time; and any one of these beneficiaries on becoming of age might thereafter make a conveyance of his interest to a stranger; but the stranger would be bound by the limitations provided

in the deed. The deed of the *cestui que trust* would convey only his interest, subject to the same limitations as applied to the grantor before conveyance. This is well settled by the case of *Lewis vs. Hawkins*, 23 Wallace, 119.

It is intimated in the answer of the respondent that the complainant did not pay full value for the interest that he purchased, and that he purchased it by releasing an antecedent debt, and that there was some usury or exorbitant interest involved in that antecedent debt.

We think that the rule in reference to such matters is well established, namely, that a person not interested in the matter cannot set up a usurious consideration for a deed. Such a defence must be made by the party from whom usury has been exacted and cannot be made in a collateral proceeding. This was established in the case of *Kendal vs. Vanderlip*, 2 Mackey, 105, which was a case at law very well illustrating the principle. In the case of *DeWolf vs. Johnson*, 10 Wheaton, 392, where the argument is made by counsel for the respondent, that a court of equity would not do such a monstrous thing as to affirm a deed, the consideration for which had been illegal or exorbitant interest, the question was fully considered and discussed; it was held that a court of equity as well as of law will refuse to entertain such an objection made by a party who is not entitled to make it, and that only the party who has paid the illegal interest or been charged the usury is entitled either at law or in equity to make this defence.

It is claimed that the sale cannot be ordered in this instance on the bill, as filed, even if the deed to Phillips from Henry F. Ogle is valid. One of the reasons assigned is that the trust created by Bateman's deed allows a right of election by the children of Ann V. Ogle, and not to a stranger, to have the property sold or conveyed. When the event had transpired mentioned in the deed upon the happening of which the property was to be sold or conveyed, at that moment the estate in the hands of a *cestui que trust* or his grantee was precisely like any other estate ac-

quired by devise, inheritance or by purchase. It was in their hands a valuable estate, and they might dispose of it in any manner they saw proper. There was no longer any reason for their being controlled or limited in their action. No one was interested except themselves, each for himself.

As to the propriety of making the sale under this proceeding, we think it is enough to say that Henry J. Ogle, in his answer, says that he had demanded the sale of the property of the trustee, and that the trustee says he is willing to sell if the court shall so order. This, we think, is a sufficient answer to the objection that the complainant has no right to ask for a sale of the property in this proceeding.

The objection that the legal title is in Marbury, trustee, and that he is not a party to this action, was sufficiently avoided by the court, appointing him trustee with direction to sell under the order of this court.

Upon the whole, we see no reason why the decree of the court below should not be *affirmed*.

EDWARD C. BIRMINGHAM

vs.

PETTIT & DRIPPS.

EVIDENCE; ADMISSIBILITY OF BOILER INSPECTOR'S REPORT; LICENSE; CONTRIBUTORY NEGLIGENCE; EXCEPTIONS; PRAYERS.

1. The report as to the cause of a boiler explosion, made by official inspectors, and filed with the Commissioners of the D. C. four days after an accident, the making of which report is not required by any law or regulation of the Commissioners, and which contains the *ex parte* statements of witnesses, is not admissible in a suit for damages against the owners of the boiler for injuries resulting from such accident, as evidence tending to prove the liability of the defendant; following *Moore vs. Langdon*, 2 Mackey, 131.
2. The question whether evidence offered at a trial is properly admissible in rebuttal, is in the discretion of the trial court and is not reviewable on appeal; following *Prindle vs. Campbell*, 18 D. C., 605.
3. Employers are not liable to an employee for the consequences of their negligence resulting in an accident, if the employee before the cause of action occurred, knew of the facts constituting negligence, and made no complaint to his employers, but willingly exposed himself to injury, without any promise on their part to remedy the defects.
4. Where a bill of exceptions refers to a paper offered in evidence, but not set out therein, and the paper is not authenticated so as to identify it before the appellate court, that court will not necessarily consider it.
5. Where several prayers are offered as a whole or series, some of which are wrong and some right, the trial court has a right to reject them all.
6. Where a record on appeal states that the portions of the charge of the court below excepted to, are printed in smaller type, and those portions as printed comprise five pages of the record, the exception is too general, and will not be considered by the appellate court; following *Langdon vs. Evans*, 3 Mackey, 1.
7. The fact that the defendant employed an unlicensed engineer, would not constitute a ground of recovery against him in a civil suit for damages, by a party injured in consequence of a boiler explosion.

At Law. No. 28,665. Decided November 14, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting,

Hearing on bill of exceptions taken by the plaintiff in an action for damages. *Judgment affirmed.*

The facts are stated in the opinion.

Messrs. ELLIS, JOHNS & McKNIGHT and JOHN LYON for plaintiff (appellant).

Mr. A. S. WORTHINGTON for defendants (appellees).

Mr. Justice HAGNER delivered the opinion of the Court:

This suit was brought by Birmingham a blacksmith in the employ of Pettit & Dripps. The declaration alleges that on the 9th of January 1888, while in the performance of his work at their foundry, an explosion of a steam boiler belonging to the defendants occurred, in consequence of which the plaintiff who was working at a forge in the foundry was seriously injured; that the boiler at the time was in a ruinous condition and entirely unsafe, and was mismanaged by the employees of the defendant in its charge, who were not competent to perform the duty assigned to them.

The defendants pleaded not guilty.

On the trial the plaintiff gave evidence tending to prove the boiler was 21 years old; that after it had been discarded and removed from some hotel, it became the property of defendants and had been for two years exposed to the weather without any protection but a coat of paint; and afterwards was put into the foundry of the defendants to run their machinery; that after two years' service there it was condemned by the inspector, and after it had been repaired it was continued in use there for two years more, when it exploded on the day named in the declaration.

He also gave evidence tending to show the material of the boiler was bad; and he produced before the jury several specimens of the metal cut out from the boiler, which his witnesses testified showed deterioration of the material of which the boiler was made; the specimens evincing that the metal had become laminated and badly scaled, and was of so perishable a nature that it could easily be removed or scaled with a penknife; that notwithstanding the city regulations requiring boilers to be inspected once a year this boiler had

not been inspected for a year and a half; that the persons who had charge of the boiler when first used by defendant were not licensed engineers; that the person who had charge of it at the time of the explosion, although a licensed engineer, was also the foreman of the shop, and necessarily so much engrossed by his other business that he had not time to look after the boiler properly. That, on the morning in question, when it was scarcely light, the plaintiff, who was at his forge at the extreme end of the building under the same shed, walked forward to the boiler; his only business with the engine and furnace being to get therefrom a shovel of live coals every morning, with which to kindle the fire in his forge. While standing near the boiler in conversation with other workmen, he heard, as he says, a noise as of a crack inside the boiler that alarmed him, and without saying anything to the others, he retired to his forge; that he remained there awhile but when he observed the others were lingering about the boiler he started back, and just as he got there the explosion took place.

The plaintiff's evidence further tended to show that when the boiler was last inspected, permission was given to carry 70 pounds of steam and no more; but that there was a pressure of 80 pounds of steam on the boiler on this occasion.

He also testified that on one occasion, some months before the accident, he casually overheard a conversation between Mr. Pettit and some stranger, in which the man said to Mr. Pettit, "That boiler will burst some of these days," to which Mr. Pettit replied, "Let her burst; we will build another."

He then gave evidence tending to show the serious character of his injuries.

After the plaintiff had closed, the defendants offered evidence tending to show the boiler was in good condition; that the defendants never had any reason to suspect otherwise; that no such conversation as was last referred to ever took place; and to show that the boiler was in good condition, they produced a large number of specimens which were

cut from the boiler in the presence of the counsel for the plaintiff. The witnesses of the defendants, who professed to be men of skill and were examined as experts in that behalf, testified that these pieces were fair specimens of the condition of the iron and that they were perfectly good and strong; and that there was nothing apparent to indicate any imperfection in the boiler.

Evidence was given tending to prove the defendants had good, competent men in charge of the boiler at the time of the explosion; that although there had not been an inspection of the boiler within twelve months, this failure was not the fault of the defendants, because the inspector came on the 4th of July, when the shops were closed, and had never repeated his visit.

The defendants also gave evidence tending to show, by one of these experts, that in his opinion from all he could see and learn of the explosion, it resulted from some unknown cause—some accident which human skill and diligence could not foresee or guard against—the reason of which was past finding out; that it did not proceed either from the decay of the boiler or the incompetency of the person in charge.

They also gave evidence tending to prove that the plaintiff was not much injured, but that he brought the suit, not so much for his injury, as in revenge for having been discharged when there was a reduction of force.

The plaintiff in his case in chief, had offered in evidence a copy of an act of the legislative assembly creating the office of steam boiler inspector, which declared it should be the duty of those officers to inspect boilers at least once in twelve months; and proved that three persons were appointed as practical engineers, to constitute the board of examiners, under an act of Congress passed in 1887, entitled "An act to regulate steam engineering in the District of Columbia," which provided it should be unlawful for any person to act as steam engineer in the District of Columbia who should not have been regularly licensed to do so by the

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Commissioners of the District. The sixth section of this law imposed a penalty upon any one who should unlawfully employ a steam engineer who had not received a license.

These were admitted without objection, as were the rules established by the Commissioners of the District of Columbia—eighteen in number—to regulate the examination and licensing of steam engineers in the District.

The plaintiff then offered the original, as it was said, of a report made by the board of examiners as to the cause of this explosion dated 13th of January, 1888, addressed to the Commissioners of the District and signed by Wilkerson, Duley and Riley, all except Wilkerson being dead. This report was lodged by the examiners in the office of the Commissioners of the District of Columbia, and was brought from their custody into court.

Objection is made on the part of the defendants to our consideration of the admissibility of the report on the ground that it is not properly inserted in the record. The exception instead of setting forth in full this original report to the Commissioners, says, ("here insert it,") and it is insisted there is no ear-mark on the paper produced at this argument to satisfy the court it is the same paper so offered in evidence.

However commendable it may be to abbreviate bills of exceptions, there must be preserved always some authentication of all the documents referred to in an exception. The alleged report, which we find among the papers in the case, is not marked filed by the clerk in the cause; nor is there the slightest ear-mark to identify it or show it was ever before the jury, although it is marked: "Filed in the office of the Commissioners." Nevertheless we shall assume that such was the fact and decline to decide this exception upon that point; though, as a matter of practice, the defendant is undoubtedly right. But assuming the report to be correctly in the record, was it admissible? It is insisted by the plaintiff its admissibility is settled by the case of *Evanston vs. Gunn*, 99 U. S., 666. The matter in controversy in that

suit was the character of the weather on a particular day, and a copy of the original record of the Signal Service office was offered to establish that point. This was properly admitted the Supreme Court decided, as within the rule which admits in evidence official registers or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular actions occurring in the course of their public duties or under their personal observation. These books are recognized by law because they belong to a particular custody, from which they are not usually taken, except by special authority, granted only where an inspection of the book is necessary. 1 Greenleaf, 483-4.

But this principle does not include the present offer. This report is not an official register or book kept in the manner stated by the author, nor does it come from the proper custody.

Furthermore, it is deemed essential to the official character of such books that the entries in them should have been made promptly after the transaction; and that they must come from the proper repository. 1 Id., 485.

In this case, the explosion occurred on the 9th, and this report was not made until the 13th day of the month.

Again it is well settled, that when admitted they are admissible only of the facts which they are intended to register, and not as to matters outside of those facts; as for instance, the registry of the baptism of a child which by act of parliament the parson is obliged to make, although evidence of the baptism at the time stated, is not evidence of the age of the child stated by the parson in the course of his certificate. This report is not required to be made by any statute, or by any act of the assembly, or by the regulations of the Commissioners. It is a mere volunteer statement proper enough undoubtedly, but not made under the important conditions which are held to be essential by the authorities.

But apart from these objections it is plain this report

is not properly admissible in evidence. It professes to contain the statements of a number of witnesses who were said to have been examined; but whether under oath or not does not appear. The examiners certainly had no right to swear them, so the testimony was taken either without the sanction of an oath, or under an extra-judicial oath; and there is nothing to show the entire inquiry was not *ex parte* so far as the defendants are concerned.

Again, it professes to set forth a decision by the examiners of the very question which was before the jury; and by way of helping them to determine who was responsible for this casualty, the plaintiff proposed to place before the jury the *ex parte* report of this self-constituted tribunal; not under oath, professing to give their opinion on the subject. The entire statement is hearsay evidence in its most objectionable form; and cannot rise to the grade of evidence at all. The jury in the pending case having been sworn to determine that question on the evidence, were not authorized to consider the conclusion or opinion of other persons who had not heard the evidence, or who had no authority to decide the controversy.

The true distinction, it seems to us, is taken in the case of *Moore vs. Langdon*, 2 Mackey, 131. In that case the plaintiff sued the defendant for flooding his land with the sewage from Le Droit Park, and as tending to prove his case he offered in evidence a letter from the Health Officer of the District, written some years before to the defendant or those in privity with him, stating there was a nuisance on Moore's land caused by the sewage flowing upon it from Barbour's premises. The General Term held the letter was hearsay, and the fact that it was written by a public officer in the discharge of his duties could not make it admissible evidence of the truth of the statements of fact therein set forth.

We think the court below was right in refusing to allow this report to be given in evidence. The court, however, allowed the party who signed it to read it for the purpose

of refreshing his memory, and he in fact testified from it, so that no harm was really done by its rejection.

The next exceptions, ten in number, are to the refusal of the court to allow evidence which was offered in rebuttal of defendants' testimony. That evidence consisted of an offer to have the specimens of iron cut from the boiler after the explosion, which the defendants had introduced, examined by new experts to ascertain their strength; and then to require these new experts to give their theory as to the bursting of this boiler and the causes generally of the bursting of boilers; also to examine them with reference to publications on the subject of the explosion of boilers and to read extracts from those publications; and also to prove that the plaintiff's experts were not experts.

The objection was made that so much of this evidence as was properly admissible should have been offered in chief; and the court so held, and refused to allow the testimony to be given to the jury.

If this reason were correct it renders it unnecessary for us to examine either of these exceptions in detail. It was decided in *Prindle vs. Campbell*, 18 D. C., 605, that the question whether evidence offered at a trial was properly admissible as rebuttal, was one to be decided in the discretion of the court and was not reviewable on appeal. The court there relied on the case of *Bannon vs. Warfield*, 42 Maryland, 39, where the court stated that the entire question as to the order of proof and under what circumstances evidence should be admitted or rejected, in the absence of some positive rule on the point, must be allowed to rest in the discretion of the court directing the trial as the tribunal best qualified to judge what the justice of the case may require in these respects; and that from the rulings on such points there is no appeal. So in *Philadelphia & Trenton R. R. vs. Stimpson*, 14 Peters, 463, Mr. Justice Story says: "Evidence offered in rebuttal might be most material to the defence. The question, then, is whether it was at the time admissible on the part of the defendant as a matter of right,

or whether its admission was a matter resting in the sound discretion of the court. * * * It is sufficient for us, however, that it was a matter of discretion and practice, in respect of which we possess no authority to revise the decision of the Circuit Court."

Therefore the propriety of the court's rulings in these ten exceptions is not before us.

The eleventh exception was to the refusal of the court to grant eight prayers, offered as a whole by the plaintiff. The offer is in this language, page 35 of the record:

"And after all the evidence had been given to the jury, and the case closed on both sides, the plaintiff, by counsel, presented to the court the following prayers for instructions to be given by the court to the jury."

Then, after setting out the prayers, it concludes with the following:

"After hearing the arguments of counsel, the court denied the said prayers, and refused to give said instructions to the jury, and in place thereof instructed the jury as follows:"

He then excepts to the refusal of the court to grant said prayers, as follows:

"To which ruling of the court, denying and refusing the aforesaid instructions prayed for by the plaintiff, and also to the instructions given by the court in place thereof, the plaintiff, by leave of the court, excepted then and there."

Afterwards, when the plaintiff excepted to the granting of the defendants' prayers by the court, he again reserved his exception to the refusal of his own prayers in these words:

"And now the plaintiff, by counsel, by leave of the court, tenders this, his fourth bill of exceptions to the rulings of the court denying the plaintiff's prayers, and refusing to give the instructions asked for by the plaintiff as aforesaid."

It will thus be seen the prayers were offered as a whole or series; were acted upon as a series, and excepted to as a series. The law is quite plain that in such a case if there was anything in either of them which is objectionable, the court has the right to reject them all.

This point has repeatedly been decided. In *Harvey vs. Tyler*, 2 Wallace, 334, Judge Miller, in delivering the opinion of the court, says: "It is a fair inference from the bill of exceptions, that each of the series of instructions refused was prayed for and excepted to as a whole." Assuming this to be so, he says it is unfair to the trial justice that such a series of prayers should be offered, many of which may be wrong, but some of which may be right, and that his refusal of the whole should be cause for reversal. Such a practice is but a snare laid for the judge to the prejudice of the administration of justice. In *Worthington vs. Mason*, 101 U. S., 149, and *Moulor vs. American Life Insurance Company*, 111 U. S., 337, the language used in presenting the prayers is almost identical with that employed in the case before us; and a similar ruling was made.

In *Chateaugay Iron Company vs. Blake*, 144 U. S., 488, the court said: "The final matter is concerning the instructions. To the general charge no exceptions were taken. Eighteen special instructions were asked and in respect to them the bill of exceptions stated: 'The court did not charge either of said requests, except as he had charged. For the refusal of the court to charge in the specific language of said hereinbefore recited request, the defendant's counsel then and there duly excepted.' In this way only is an exception taken to the matter of the instruction. But this wholesale exception is not sufficient."

The next exception is to the action of the court in granting one instruction in place of two, which were offered by the plaintiff, and in granting several prayers asked for by the defendants. We have examined them with care, and think the action of the court was right.

The prayer granted by the court, in lieu of two prayers asked for by the plaintiff, is in these words:

"The jury are instructed that the defendants are not to be held as insurers or guarantors of the absolute soundness and safety of the boiler used by them, but they were bound to exercise all reasonable care in the selection of the boiler

in the first instance, and in the management of it while in their use, and if they neglected to exercise such care in either respect, or failed to employ competent persons or a sufficient force to give proper attention and management, and in consequence of such failure or neglect, the boiler exploded, and the plaintiff was thereby injured, the plaintiff is entitled to recover, unless the jury shall further find that the plaintiff's own carelessness contributed to his injury, as hereafter explained in instructions numbers three and four, given at the instance of the defendants."

The plaintiff insists the court, by the use of the expression: "The defendants are not to be held as insurers or guarantors," brought to the notice of the jury for the first time the idea of the liability of the defendants as insurers or guarantors, and that this irrelevant matter had a tendency to mislead them, as no contention had been made up to that time that they were guarantors. We think the judge could not have been expected to discuss this subject without pointing out this distinction; in view of the testimony given by Wilkerson one of the examiners, to the effect that the explosion did not result from any defect in the iron of which the boiler was composed, or from any mismanagement, but was the result of causes which science could not detect; and also of the testimony of Noyes and Duvall the witnesses of the defendants, who testified on page 21 as experts, "that explosion may take place in the most perfect boiler, and it may be impossible to account for it"; and that "in their opinion, such was the explosion in this case."

The first of the defendants' prayers was to the effect that if the explosion was caused solely by a defect in the boiler, the jury could, nevertheless, render a verdict for the defendants, if they should find the defendants exercised reasonable care in the selection of said boiler in the first instance; unless they further find from the evidence that such defect was known to the defendants or their agents in charge of the boiler, or that by the exercise of reasonable diligence and care the defendants or their agents in charge of the

boiler could have discovered such defect before the explosion occurred.

The second prayer states the law correctly as to the exoneration of the defendants where the accident occurred from the conduct of a fellow workman, and is properly expressed.

The third prayer of the defendants was:

"The jury are instructed that if they find from the evidence that the explosion was the result solely of a defect in the boiler or its appurtenances, and that such defect was known to the defendants or their agent or agents in charge of the boiler at the time of the explosion, or might have been known to the defendants or such agents by the exercise of reasonable diligence and care on their part, they will, nevertheless, render a verdict for the defendants, if they further find from the evidence that prior to the explosion the plaintiff had learned that the boiler was in an unsafe condition, or was liable to explode, or had reasonable cause to believe and did believe that such defect existed, or that such explosion was liable to occur, and that the plaintiff had not made any complaint, or given any notice to the defendants or their agents in charge of the boiler in regard to such defect or liability to explode, and had not in any way been led to believe by the defendants or their agent or agents that such defect would be remedied, or such anticipated explosion prevented."

There was evidence to support this instruction. The plaintiff himself testified that shortly before the explosion he heard a noise as of a crack in the boiler which alarmed him; and yet that he told no one about it. He testified, furthermore, that he overheard a man tell Pettit that some boiler, which he assumed to be this one, would burst some of these days; to which Mr. Pettit made the very humane remark, "Let her burst; we will build another." And still he said nothing on the subject.

This is precisely what we have decided in the case of May, where a man working in a gravel bank in the north-

ern part of the city, testified he was satisfied the bank would fall and yet gave no warning of the supposed danger, and persisted in digging under the bank, which finally fell on him and injured him. We held that he disintituled himself to recover by his own conduct.

The fourth instruction of the defendants is to the same effect:

"If the jury find from the evidence that the boiler which exploded, at the time of the explosion and prior thereto, was insufficiently manned, it not having a competent engineer whose sole duty it was to look after the engine and boiler, and that the explosion resulted solely from this cause, but that the plaintiff, at the time of the explosion, and for several months immediately prior thereto, from his own observation while in the employment of the defendants in the same room in which the engine and boiler were situated, knew that there was no person charged with the sole duty of looking after the engine and boiler; and further knew on this account the boiler was not properly watched and guarded, and that the plaintiff, without remonstrance or complaint to the defendants or any of their agents, continued at his work, and unnecessarily placed himself in proximity to the boiler at the moment of the explosion, they will render a verdict for the defendants."

This, with the three other instructions asked on behalf of the defendants, we think proper, and we see no ground for a reversal in respect of either.

The judge then gave a charge covering the whole ground, to which there are various exceptions, the consideration of which raises another point of practice. In looking at the charge, we find it is written out in typewriting, but we take it for granted it was delivered *ore tenus* and afterwards reduced to writing. In the original exception it is stated that all those parts are excepted to which are enclosed in red ink. In the record, nothing of the sort appears, but there is a printed statement to the effect that "the portions of said charge excepted to are indicated above by being printed in

smaller type." Then we find nearly four pages in small type, of various portions of the charge, to which exception is made, without pointing out the portions deemed to be erroneous. It has been decided again and again that an exception to a charge, generally, is of no avail, if there be anything in the charge which is right; and that it is not incumbent upon the court to search through the record to ascertain what the alleged error is, when the party who alleges the error has not taken the trouble to point it out.

There are certainly correct statements of law throughout the designated pages, even if they also contain errors.

In *Langdon vs. Evans*, 3 Mackey, 1, this proposition appears:

"An exception contained the charge of the court and stated 'and to so much of the said instruction granted by the court, on its own motion, as are contained in brackets,' plaintiff excepts," etc. Upwards of two pages of the charge were thus contained in brackets. *Held*, that the exception being a wholesale one, pointing out no particular remark in the charge as incorrect, did not properly present to this court any question which it was called upon to examine.

If an extract containing two pages was of such a character that it could not be excepted to generally in *Langdon vs. Evans*, certainly these numerous extracts from this charge in the present case, some of them containing more than two pages, and all of them when taken together, comprehending four or five pages, would be obnoxious to the same objection. We have read the charge and we do not think there is anything in it worthy of being made the subject of a reversal; but as we are not at liberty to go into its examination we refrain.

There is one matter much relied upon, presented by one of the plaintiff's prayers; that if the jury found the defendants had been employing a person who was not a licensed engineer, then they must find a verdict for the plaintiff.

The refusal to grant this prayer was perfectly proper, because it omits all reference to many matters which should

have been included; such as the question of contributory negligence. But apart from this objection, the principle of the prayer is incorrect. It would not constitute any ground of recovery in this case that the defendants had at one period violated the law as to the employment of an engineer, although they might thereby have subjected themselves to a liability under the statute. For it would not show culpability of the defendants with respect to the explosion; since the unlicensed engineer might be perfectly competent, and there might be proof that the boiler was managed with perfect propriety.

Finding no error the judgment below is affirmed.

Mr. Justice JAMES: I want to make a single concurring remark as to the grouping of prayers in an exception. It is sometimes supposed that the difficulty arises when the appellate court is asked to pick out where the error lies, and that they will not examine a group of instructions for that purpose. I think the difficulty really arises at the trial. When counsel offer a series of instructions, it may be understood by the court that the series is interdependent. It is not uncommon to state propositions which depend upon each other, so as to ultimately cover all the ground in a case. It is only fair, therefore, and it is requisite, that counsel should give the court to understand that they offer these instructions independently, one proposition at a time, and thereby called upon the court to consider each one of them by itself, so that the court may grant some, even if they refuse others. The objection is that the trial court itself is misled when a series of instructions is offered apparently as such. The court then can only receive them all or reject them all; but if the proposition is that the court is to regard these prayers as independent prayers, and each as a proposition which is asked independently, it then becomes the duty of the judge to grant such of the instructions as he conceives to be correct, and to reject the others.

I think that the real point is at that time to be considered by the court, and it does not arise upon the other principle

which applies to the charge—that the court of error will not search to find out where something not pointed out by counsel, is objectionable.

Regarded in this way, it is a very material principle that counsel must not offer prayers as a series unless they expect them to be considered in that way.

WILLIAM M. HOWARD ET AL.

vs.

ROBERT S. HOWARD ET AL.

PARTITION ; DISPUTE AS TO TITLE

Equity will not decree partition of real estate while the title is in dispute between the parties. If the complainants aver title, and the title is disputed, equity will either dismiss the bill or retain the cause in order that the question of title may be determined by a suit at law.

In Equity. No. 12,833. Decided November 14, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on an appeal by the defendants from a decree for sale in a suit for partition. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. W. W. BOARMAN, F. H. MACKEY and LEMUEL FUGITT for defendants (appellants).

Mr. L. CABELL WILLIAMSON for complainants (appellees).

The CHIEF JUSTICE delivered the opinion of the Court :

The plaintiffs filed their bill alleging that they and the defendant Robert S. Howard, together with the infant co-defendants are the only heirs of Charles Howard, who, since the 10th of March, 1847, and up to the time of his death, December 4th, 1869, was seized and possessed of a certain

piece of real estate in the District of Columbia; that the said real estate descended from said Charles Howard to the parties to this suit, subject to the dower of their mother, Eliza Howard, who died on the 7th day of March, 1878; that a majority of the complainants and the first named defendant, Robert S. Howard, with their mother, resided on said real estate from the death of said Charles Howard until the death of said Eliza Howard; that said Robert S. Howard has remained continuously in possession of said real estate ever since the other complainants removed therefrom; that complainants are advised and so charge, that they, with the defendants, are tenants in common of the said real estate, and are entitled to a partition of the same; that said real estate is not susceptible of a partition in kind, and they accordingly pray a sale and partition of the proceeds among the complainants and defendants.

To this bill the defendant, Robert S. Howard, answers, denying that said Charles Howard was ever seized of the property as alleged, or that the said real estate descended to the parties to this suit. He admits that after the death of said Charles Howard, a majority of the complainants, with the said Eliza Howard, resided with respondent on the real estate in question, until about a year after the death of said Eliza Howard. He admits that he has continuously occupied and remained in possession of the said real estate ever since complainants abandoned said land and moved away from the same; and that he has, moreover, continuously occupied the said real estate from the death of said Charles Howard, in 1869, and has always and continuously from that time to the present, occupied and still occupies and holds the same, adversely against all persons whomsoever. He prays the same relief by his answer as if he had specially demurred to the bill.

A motion was made by the defendant, after the filing of his answer in the court below, to dismiss the bill upon the pleadings. This motion was overruled, a replication was filed, and the party proceeded to take testimony. A decree

was entered in the court below on the testimony, and from that decree an appeal was taken to this court.

It is claimed by the defendant that this rule is plainly an ejectment suit in disguise. The complainants allege in their bill that they are tenants in common with the defendants, and the defendant answers denying this, and averring that he is in the exclusive possession of the property, and claims it against all the world.

There is no better settled rule of equity jurisprudence than that which declares that a court of equity will never decree a partition while the title is in dispute between the parties. If the complainants aver title, and that title, as a matter of fact, is disputed, a court of equity will either dismiss the bill or retain the cause, in order that the question of title may be determined by a suit at law.

This is well settled by numerous authorities, among which we refer to 3 Pomeroy's Equity Jurisprudence, Sec. 1388; 1 Story's Equity Juris., note 1 to Sec. 650; Willard's Equity Juris., 704; and Lessee of McCall *vs.* Carpenter, 18 Howard, 302.

In the case of Wilkin *vs.* Wilkin, 1st Johnson's Chancery, 111, Chancellor Kent says:

"A court of equity will not sustain a bill for partition where the title is denied, but the bill will be retained to give the plaintiff an opportunity to establish his title at law."

To the same effect may be cited 35 Missouri, 326; 5th Barb. (N. Y.), 62; 35 Wis., 141; 31 Wis., 202; 22 Mich., 59; 33 Miss., 149; and 26 Ill., 473.

The same rule is established in England.

It is true that these pleadings show such a state of facts as that if it had been true that Charles Howard had died seized of these premises, Robert S. Howard and his brothers and sisters would have inherited the title, and they would necessarily have been tenants in common; but by his answer Robert S. Howard denies that Charles Howard was ever seized of the premises, while he admits his occupation for the time mentioned in the bill. He says, however, that his

father never occupied it as owner, and was never seized of the premises, and therefore neither he nor any of his brothers or sisters ever inherited any interest in the premises from their deceased father.

That makes an issue of fact which can only be disposed of by an action in ejectment. The title should be established by an action at law before this court is called upon to divide the premises between the parties.

In effect Robert S. Howard says, my occupancy cannot be disturbed by the complainants nor any one except the real owner, and I deny that the complainants have any title to or any interest whatever in the land.

The decree of the court below will be reversed, and the cause remanded with instructions to the court below to dismiss the bill unless the complainants shall, within a reasonable time to be fixed by that court, bring an action at law to establish their title.

DUDLEY WEBSTER

vs.

THE NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY ET AL.

INSURANCE POLICY; SURRENDER; BENEFICIARIES; ESTOPPEL.

1. A circular issued by an insurance company, and sent to a policy holder, stating that "Every policy upon which two or more annual premiums have been paid has a cash value payable when application is made therefor upon the anniversary of any subsequent premium, provided a legal discharge can be given," applies to policies existing, as well as to those which might be taken out in the future, especially when the insured under an existing policy has been led to change his position to his detriment by reason of such circular.
2. When a policy having a cash surrender value is made payable to the insured, his executors, administrators and assigns "for the benefit of his wife, if she shall survive him, otherwise for the benefit of his then surviving children, and the then surviving descendants of any then deceased child or children, instead of

such deceased child or children respectively, subject however, to any provisions or conditions made by the will" of the insured, and insured is eighty years of age, and has survived his wife, and but two adult children survive, neither of whom is dependent upon their father, the insured and his two children, upon their application to the company can legally compel the payment of the surrender value, and their agreement and acquittance will fully exonerate and protect the company on such payment.

Equity. No. 47,623. Decided November 17, 1892.

The CHIEF JUSTICE and Justices HAGNER and BRADLEY sitting.

Appeal by the complainant from a decree of the special term dismissing a bill in equity. *Reversed.*

The facts are stated in the opinion.

Mr. H. O. CLAUGHTON for complainant (appellant).

Mr. H. E. DAVIS for defendants (appellees).

Mr. Justice BRADLEY delivered the opinion of the Court:

This cause is here upon the complainant's appeal from the decree of the special term dismissing his bill.

The cause was heard upon the bill, the answers of the defendants, and stipulation of the parties as to some agreed facts. It appears, by the record, that on the 5th day of November, 1846, the complainant insured his life in the defendant company for the sum of \$2,000; that he regularly paid the annual premiums thereon up to and including the 5th day of November, 1886, and that on the 5th day of November, 1887, he offered to surrender the policy, which he claimed had at that time a surrender value, and asked that that value be paid to him. Thereupon certain negotiations were had between the complainant and the defendant company, which were not productive of the desired result to the complainant, and he filed this bill on the 13th day of June, 1889, by which he prays that the defendant company may be decreed to pay to him the amount of his policy. It is conceded that the complainant fully complied with all the provisions of the contract of insurance, but it is insisted that his policy has no surrender value because its date was long

anterior to the provisions of the statute law of the State of Massachusetts, where this defendant company was incorporated, which provided for a cash surrender value upon policies after the payment of two annual premiums, application being made therefor upon any anniversary of a premium payment.

It is also insisted that if the policy had a surrender value under the law, the complainant is not entitled to demand its payment because it is alleged that he is unable to give a legal discharge to the company.

It appears by the record that at the time of filing his bill the complainant was 80 years old, and that for forty years he had paid to the defendant company, in addition to other sums required by the policy to be deposited, the annual premium of \$51.20, and that, therefore, without taking into consideration any question of interest upon the amounts paid, the company has received upon the policy sums which, in the aggregate, considerably exceed the amount of the insurance. By the policy, the company contracts to pay to the complainant, his executors, administrators and assigns, the sum insured, "for the benefit of his wife, if she shall survive him, otherwise for the benefit of his then surviving children, and the then surviving descendants of any then deceased child or children, instead of such deceased child or children respectively, subject, however, to any provisions or conditions made by the will of" the complainant. The complainant was married at the time of taking out this policy. His wife died in the year 1888. It is admitted that two children only survive, and that they are the defendants, Park Webster and Clayton Webster, aged respectively forty-seven and forty-four years, at the date of the filing of the bill. Both of these defendants have answered the bill, admitting its allegations, conceding the right of the complainant to demand and receive the surrender value of the policy, and releasing the defendant company from all liability to them, provided the amount of the policy or its surrender value is paid the complainant.

It is contended, under the peculiar terms of the policy, with reference to the beneficiaries, that until the decease of the assured, it is and will be impossible to ascertain the persons entitled to its proceeds.

The act of the legislature of Massachusetts of April 23, 1880, gives a surrender value to a policy after the payment of two annual premiums, upon the termination of the insurable interest in the life of the insured, and provides that the insurable interest shall be construed to have terminated when the insured has no minor or dependent child, and his wife, if he has one, and any living beneficiary or beneficiaries named in the policy, shall join in the application for surrender thereof.

A circular issued by the defendant company May 21, 1883, and distributed by it to its patrons, announced that "a policy made for the benefit of the insured can be legally surrendered by himself or by his administrator or executor. When made for the benefit of a married woman, it can be surrendered upon her receipt and that of her husband. If made for the benefit of children, it must be shown to the satisfaction of the company that the insured had no minor or dependent child."

Although it is admitted that the complainant and his two sons could give a complete discharge and acquittance to the company if children only were named as beneficiaries, it is denied that under the peculiar description of the beneficiaries given in the policy, and in view of the possible contingency of the death of a child prior to that of the assured leaving children, and of the possibility of the remarrying of the insured and of his leaving of a widow or other child, the sons have not such a present interest as would enable them to give such a discharge as would completely protect the company. The contingency first named might happen. It is possible. But the last named contingency by reason of the advanced age of complainant, is one that might be well deemed beyond the range of the probable, if not within the realm of the impossible.

The argument has been pressed with much force in behalf of the complainant, that in view of the fact that the insurance is made payable to him, his executors, administrators and assigns, for the benefit of his wife if she shall survive him, otherwise for the benefit of his then surviving children, &c., subject, however, to any provisions or conditions made by his will, the beneficial interest as conferred is in the nature of a testamentary disposition, that it is ambulatory and revocable at any time by the insured, and that no beneficial right or interest has vested under the policy in any of the beneficiaries named.

It is also urged in that connection that in the event of the death of the insured, the proceeds of the policy would, in the hands of the executor or administrator, be subject to the debts of the decedent, and that creditors would have a superior right to the beneficiary.

There would appear to be no sound reason against the absolute control of the insured over a policy upon which he is paying the premiums, and in which some third person, not a creditor, is named as beneficiary, save the existence of a vested right in such person. The insured may decline to pay the premiums and may permit the policy to lapse, and hence it has been argued, and it has been held by some courts, that the insured, under such circumstances, may surrender his policy absolutely or substitute a new one with different beneficiary. On the other hand, it has been held, and the weight of authority is that way, that inasmuch as the beneficiary may elect to pay the premiums and continue the policy, his right is vested, and the policy cannot be surrendered by the insured without his consent, so as to deprive him of his right, or relieve the company of responsibility to him. If it is upon that principle that the insured, under such circumstances, cannot validly surrender or change the direction of his policy, without the concurrence of the beneficiary, it would seem to be equally logical and true that when the beneficial interest is directed to a person or a class having no actual existence, and as to whom, as in

this case, there is no certainty of future existence, the beneficiary is a mere supposition; and inasmuch as there is no one whose interests can be consulted, or whose rights can be prejudiced, the insured must be absolute in his control of his policy.

Be that as it may, and deeming it unnecessary to determine whether the beneficial interest is vested or not, we are of opinion, if the quoted provisions of the law and of the company's circular apply to this policy, and it has a surrender value, inasmuch as there is no wife and there are no dependent children, and the only beneficiaries in being unite with the complainant in making a demand for the surrender value to be paid to the complainant, that the complainant and his sons, defendants in this cause, can by their agreement and acquittance, fully exonerate and protect the company.

The remaining question is claimed by the defendant company to be conclusively settled by the legislation of the State of Massachusetts against the asserted right of the complainant. By an act of that legislature of April 10, 1861, it was enacted that no policy of insurance on life thereafter issued by any company chartered under the authority of that Commonwealth should become forfeited by the non-payment of premium thereon.

By a resolution of the defendant company adopted August 27, 1867, all the privileges and benefits of that act were extended and made applicable to all policies of that company, then in force. It is conceded that under this resolution the policy in question in this cause became non-forfeitable. By a subsequent act of April 23, 1880, it is provided generally that no life policy issued by any company incorporated or organized under the laws of that Commonwealth should become forfeited or void for non-payment of premium after the payment of two full annual premiums. By another section of the same act, it is provided that when the insurable interest in the life of the insured has terminated, after the payment of two annual premiums, the net value of the

policy shall be a surrender value payable in cash, which the holder of the policy could claim or recover in cash upon any anniversary of a premium payment; and by a succeeding section, that the insurable interest shall be construed to have terminated when the insured had no minor or dependent child, and his wife, if he has one, and any living beneficiary or beneficiaries named in the policy, shall join in the application for surrender.

The two acts of 1861 and 1880 were consolidated and reenacted November 19, 1881, and the surrender value feature was made to apply only to policies issued after December 31, 1880. An act of April 21, 1887, amending and codifying the statutes relating to insurance, probably for the purpose of determining the question, whether the act of April 23, 1880, which was unlimited and general in its terms, should have a retroactive effect, provides that all policies theretofore issued shall be subject to the provisions of law applicable and in force at the date of such issue. It is averred in the bill and admitted by the answer that the complainant offered to surrender his policy on November 5, 1887, the premium anniversary.

At that date, under the legislation of the State of Massachusetts, all doubt that might have surrounded the question, whether the act of April 23, 1880, was by the legislature intended to be, or could lawfully be, construed to be retroactive, had been definitely settled by the act of April 21 of the same year.

Without, therefore, the aid of some force outside of the contract stipulations of the policy itself, and independent of the statute law, this policy, although made non-forfeitable by resolution of the defendant company, had at the time of its attempted surrender no surrender value. The complainant contends that this force is found in his acceptance of a proposition made in the circular of the defendant company, issued May 21, 1883, in which it was announced that every policy upon which two or more annual premiums had been paid has a cash surrender value, which can be

obtained upon demand upon the company in the manner and at the times indicated in the circular.

In behalf of the company it is claimed that this circular was not intended to amend or modify existing contracts of insurance, but that it applies only to future insurance, and that its object and purpose were simply to present the advantages under the Massachusetts law to policyholders for the purpose of inducing new insurance. The circular, so far as it is necessary to quote it for the purposes of this point, is as follows:

“Features of the Massachusetts Non-Forfeiture Law.

“First. Every policy upon which two or more annual premiums have been paid has a cash value payable when application is made therefor upon the anniversary of any subsequent premium, provided a legal discharge can be given.”

It would appear to be beyond question that it was within the power of the company to offer additional benefits and privileges to its patrons above those conferred by existing contracts of insurance, not only as an inducement to new insurance, but as an incentive for the continuance of old insurance, and that when such offer forms the consideration in part for the payment of premiums upon an old policy, and of its continuance in force by the insured, the company would be bound by its contract.

The circular purports to be a statement of the condition of the Massachusetts law relating to non-forfeiture and surrender value. It was issued after the act of 1880 had been modified by that of November 19, 1881, and under the provision of the latter act, the surrender value feature was not applicable to the policy in suit. It does not, in terms, apply the feature of surrender value to future insurance, nor is it, in terms, prospective. It deals with the present. It relates to every policy upon which two or more annual premiums have been paid, and it expressly declares that such a policy has a cash value.

If the company had intended its circular solely as an in-

ducement for future insurance, it would have been a very easy matter, and the most natural form of expression to use, to have extended the privilege to policies upon which two premiums shall be paid and to have provided that they shall have a cash value.

The most reasonable and the only proper construction of the language used, makes it applicable to policies then existing, as well as to such as might be taken out in the future. The complainant so construed it. He accepted the privilege extended to him as a policy holder at the date of the circular, and he was induced to act upon it by ceasing the payment of premiums, and by offering to surrender the policy on an anniversary and by demanding the payment of the cash surrender value.

Since November 5, 1886, he has paid no premium, and he has been led by the declared right contained within the circular, and by its invitation to put himself in a position of default in the payment of premium, with whatever of loss or inconvenience may be entailed thereby, unless his offer to surrender is accepted, and his claim to the payment of cash value of his policy is satisfied.

In other words, he has been led to change his position to his detriment, upon the faith of the company's circular; and we are of opinion that under the plain doctrine of estoppel, the defendant company cannot be permitted to deny that the policy in suit has a surrender cash value.

The complainant is entitled to recover from the defendant company the cash value of his policy.

The decree of the special term is reversed, and a decree, requiring the defendant to pay to the complainant the cash value of his policy as of the date of November 5, 1887, upon his executing and delivering to the company his bond of indemnity, as tendered by him in his bill, will be entered, the defendant to pay the costs of the cause.

If the parties can agree upon the amount, there will be no necessity for an audit, and its expense may be saved; otherwise the cause will be referred to the Auditor to ascertain and report the amount.

WILLIAM H. FEARSON ET AL.

vs.

FRANCIS K. DUNLOP ET AL.

RIGHTS OF CREDITORS; RESTRICTIONS UPON ALIENATION.

J. D. bequeathed to his son W., certain stocks to hold in trust for F. for life "for his maintenance and support, to pay to him the interest accruing thereon, or so much as is needful for that and for the like purpose, to sell the whole or any part of the principal, as in his (W.'s) discretion he may think best, and at the death of F. to pay over the same, in equal shares, to the brothers and sister of F.;" *Held*, that the extent of F.'s interest in this bequest was to have the income applied to his support and maintenance, and such income could not be subjected by F.'s creditors to the payment of his debts due them, especially when it was not shown that such debts were not for necessities.

In Equity. No. 13,298. Decided November 21, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing in the General Term in the first instance. *Demurrer sustained.*

The facts are stated in the opinion.

Mr. C. A. BRANDENBURG for plaintiffs.

Messrs. WM. A. & J. HOLDSWORTH GORDON for defendants.

Mr. Justice JAMES delivered the opinion of the Court:

In this bill the complainants set forth that on the 8th day of July, 1891, they recovered in this court a judgment against the defendant, Francis K. Dunlop, for \$110.72, with interest from April 1, 1891; that they afterwards sued out a writ of *fi. fa.* thereon, which was returned *nulla bona*; that said judgment never has been satisfied, and said defendant has no property in this District out of which it can be made by execution; that in the year 1872, James Dunlop died

in this District, leaving his last will and testament, and a codicil, which were duly admitted to probate in the special term of this court for Orphans' Court business, on the 15th day of May, 1872; that by said will certain bonds, and by said codicil certain moneys, were left to defendant, William L. Dunlop, in trust for said Francis, as appears by the will and codicil which are made part of the bill. The bill thereupon prays discovery by the defendant, William Dunlop, of the income received by him for Francis, for a receiver, who shall apply the said income to the payment of said judgment, and that a portion of such stock and bonds may be sold, and the proceeds applied to the same purpose.

The provisions of the will relating to Francis Dunlop are as follows:

"I give to my son, Francis K. Dunlop, for life, to be held by my son, William L. Dunlop, in trust for the life of Francis, six thousand dollars Hannibal & St. Joseph, Missouri, six per cent. State bonds; also eight thousand dollars Nashville and Chattanooga Railroad bonds, guaranteed by the State of Tennessee, six per cent.

"Also six thousand State of Tennessee five per cent. bonds. My son William is to hold in trust for said Francis for life the said stocks, for his maintenance and support, to pay to him the interest accruing thereon, or so much as is needful, for that and for the like purpose, to sell the whole or any part of the principal, as in his discretion he may think best, and at the death of Francis, to pay over the same, in equal shares, to the brothers and sister of Francis, it being supposed by me Francis will never marry, and I commend Francis to the care and protection of his brothers and sister."

The codicil, so far as it related to Francis, was as follows: "It is my will and desire that out of my clear personal estate there shall be added to the fund set apart for the support of my son, Francis K. Dunlop, the further sum of twenty thousand dollars, to be managed by my son, William, for the use of Francis during his life, and at the death of Francis,

the principal to go in perpetuity to William, my son and executor, his heirs and assigns."

The first question relates to the construction of these instruments. The will contains several substantive matters. Without reference to their order, they are, first, a bequest in trust for Francis for his life; second, that this bequest shall be for his maintenance and support; third, that after his death the corpus of the bequest shall go to his brothers and sister; fourth, that the trustee may sell these bonds at his discretion. The style of this instrument is inartificial, but when the number and nature of the subjects are considered, we think it is to be read as if it ran as follows: These stocks are to be for the maintenance of Francis; the interest thereon, or so much as is needful for that and for the like purpose, is to be paid to him; the whole or any part of the principal, as the trustee may think best, may be sold; at the death of Francis "the same"—meaning the stocks or other proceeds—is to be paid over in equal shares to the brothers and sister of Francis. As to the codicil, it is to be observed that twenty thousand dollars are to be added to the fund set apart in the will for the support and maintenance of Francis. This word "added" shows that this further sum shall stand on the same footing, as to terms, with the original provision. Like that provision, it is to be held in trust by William, the income only is to go to Francis; that income is to be paid to him personally; and then, by the express direction of the codicil, the corpus is to go to William.

We think it is clear that it was the intent of the testator that each year's income should be paid to Francis as his means of maintenance and support for that year; that each year's income was to be found ready for that purpose as it should be wanted for that purpose; that the only interest that was given to Francis was an interest to have such income as it should accrue, and to have the expenditure of these moneys, and that this expenditure was to be his means of support. He was not intended to have a proprietary right

to capitalize this future annual support and make it, by means of his contracts, liable to creditors. His trustee, acting reasonably and in good faith, was to have something to say about the extent to which his support was to go. That matter was one part of the trust. The effect of such a provision as this seems to be, that the beneficiary acquired nothing that he could dispose of but the moneys paid into his hands, and the right to have those moneys to the extent of the income, if reasonably needful. The power of the trustee to sell was not given in order that the proceeds might be applied in addition to the income, to the support of Francis, but in order that the fund should not remain badly invested. Instead of being thus diminished, the corpus was to go next to the brothers and sister. If the whole extent of his interest in this bequest was, to have the income applied to his support, it could not be said that he had an interest to have it applied to his debts generally. And it is to be observed that this bill does not show that the contract was even for something needful to support and maintenance. In short, we find that it was not the intent of the testator that Francis should be furnished with the means of paying his way, and then have besides such an interest in this bequest that, by contracting debts, he should also have power to affect the corpus, or even the future income. He intended to shut out creditors as far as this bequest should be concerned. The question then arises, whether a provision which does this is valid.

The question whether a beneficial interest can be so given in trust, whether by devise or by voluntary conveyance, that the creditors of the beneficiary shall not subject it to their judgments, has been discussed in two opinions of the Supreme Court. In *Nichols vs. Levy*, 5 Wall., 433, the court held that it was bound by the decisions of the State Supreme Court, as a rule of property, and therefore to hold that certain lands in that State, conveyed in trust, with provisions against creditors, could not be reached by the latter. It took occasion, however, to express its opinion as to the

general rule. Mr. Justice Swayne, speaking for the court, said:

"If the determination of this case depended upon the general principles of jurisprudence, the result must necessarily be in favor of the appellees. It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go. * * * But the case does not turn upon these considerations."

It is to be observed that this was an adoption, as shown by the authorities cited, of the rule of the English court of chancery.

Nine years later, the same court, speaking through Mr. Justice Miller, took occasion, in *Nichols, assignee, vs. Eaton et al.*, 91 U. S., 717, to express its opinion at some length concerning that rule. The court said, page 725:

"But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English chancery court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has engrafted upon the common

law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities, and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

The learned justice proceeded to point out that all the States have recognized, by their exemption laws, the policy of allowing property to be enjoyed without liability to be taken by creditors, in cases which call for such protection; and the further fact that our system of recording wills gives to intending creditors the same warning which they receive from the exemption laws; warning, namely, not to rely on the testamentary provision, which has been withdrawn from their reach.

After citing a number of State decisions, in which the validity of provisions against creditors had been recognized, the court concluded as follows:

"We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. * * * We have indicated our views in this matter rather to forestall any inference that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than

because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed."

This opinion completely disposes, and evidently was intended to dispose, of the dictum in *Nichols vs. Levy*, and expresses a deliberate conclusion of the Supreme Court, that it is not necessary, in order to prevent creditors from taking the property devised for the beneficiary's support, that there should be a cessor of title.

The principle asserted in the later cases seems to be that, when a testator devises less than a fee-simple, he may define precisely the extent and the application of the interest which the *cestui que trust* is to have. Indeed, the application of such interest will be found, on analysis, to be only an expression of its extent. Substantially, the testator has a right to say: "I give to my beneficiary an interest only to the following extent; namely, to such extent that it may be used and applied for his maintenance and support, but not such an interest as may be used and applied to the payment of creditors who may choose to give him credit." It is not in the power of a creditor to enlarge the interest which the testator has chosen to give, and the extent of the interest given by the testator is not to be construed by the courts to be larger than the testator declares it to be, in order to benefit persons who have no original interest in the gift. There is no place for public policy in the matter. To say that public policy requires that creditors who extend their credits after such devise should have a right to be paid out of it, is equivalent to saying that the devisee ought to have by the devise more than the testator has given him. It is a mere indirection to talk about the creditor's rights; the actual operation of the proposition insisted on is, that notwithstanding the testator undertook to give only the annual income of the property, to be used year by year, as it should accrue, for the support of the beneficiary, the latter, the beneficiary, should take an interest to be used in a wholly different way; in other words, take an

interest in such a way as to enable him to defeat the testator's purpose to secure his support by using it up. To call this a creditor's right, or to talk of policy in such a connection, is a mere confusion of subjects.

The result of our conclusion is that *we must sustain the demurrer which the defendants interposed to the bill.*

JAMES G. PAYNE

vs.

SAMUEL C. POMEROY AND GLEN W. COOPER.

CONTRACTS; IMPOSSIBILITY OF PERFORMANCE; CONSTRUCTIVE NOTICE; CONSTRUCTION OF WRITINGS.

1. As soon as one person has disabled himself from performing his contract with another, the latter's right of action accrues, and he need not wait to ascertain whether his rights may not ultimately be secured to him.
2. When a contract is made with trustees to purchase property in their name, and the property is subsequently purchased in the name of another party, a right of action at once accrues, and the fact that the trustees might at some future time re-purchase the property and perform their covenants, will not prevent a recovery.
3. The filing of articles of incorporation of a railroad company in the proper office therefor, reciting the ownership of property, is not notice to the public that the title to the property which had previously been in another party, is in the incorporation.
4. Where writings contain peculiar words of art, or phrases used in commerce or trade, the determination of the meaning of such words or phrases should be left to the jury; but subject to this ascertainment by the jury, it is for the court to decide the meaning of written instruments.

At Law. No. 26,162. Decided November 21, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing upon a bill of exceptions and case stated, taken by the defendants. *Judgment affirmed.*

The facts are stated in the opinion.

Messrs. J. M. WILSON and W. S. FLIPPIN for defendants (appellants).

Messrs. TAYLOR & PAYNE for plaintiff (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This is an action at law brought by the plaintiff to recover the sum of \$5,000 with interest from the 10th day of April, 1883, which the plaintiff claimed he "delivered to the defendants on that date to be used and applied by them in the purchase of the property of the late Pennsylvania and Sodus Bay Railroad Company, under an agreement whereby the title to said property was to be at once conveyed to the defendants as trustees for the protection of the parties advancing the said purchase money; but the defendants did not apply the said money or any part thereof to the purchase of said property; but the said property was sold and conveyed to other party or parties; whereupon the plaintiff demanded from the defendants the return of said money, but they wholly refused and still refuse to return the same or any part thereof."

The circumstances out of which this transaction arose, as appearing in the record, were these: In the spring of 1883, Mr. Cooper approached Mr. Payne and requested him to become a subscriber to a scheme then on foot to purchase railroad named, with all of its appliances, located in the northern part of the State of New York. He showed Payne an agreement dated 12th of March, 1883, by which certain Dudley and Dean agreed to sell to Sears, Crowley and Clapp all the property, real and personal, lately belonging to the railroad company, which had been purchased by Merritt & King, at a sale under a judgment of the Supreme Court of the State of New York; allowing them until the 12th day of April, 1883, to examine the records and legal proceedings and to inspect the property; and if Sears, Crowley and Clapp should elect to purchase, Dudley and Dean agreed to convey to them the property on the payment of \$35,000 in cash, on or before the said 12th day of April.

Another paper then shown to Payne, dated 16th of March 1883, was a transfer of the property and franchises from

Sears, Crowley and Clapp to Cooper and Pomeroy. It recited that in procuring the optional contract, certain expenditures were made amounting to \$5,000, which were paid by Cooper and Pomeroy, and in consideration of said advances, the grantees in said optional contract thereby sell, assign and transfer unto Cooper and Pomeroy, and the survivor of them, his heirs and assigns, all the right, title and interest which said Sears, Crowley and Clapp had acquired by virtue of said optional contract.

"The same to be held by said Cooper and Pomeroy and the survivor of them in trust for the repayment of the said money advanced as aforesaid, until said contract shall have been, or shall be performed, when this assignment shall merge into and be provided for as the further agreement made contemporaneous herewith, which hereby is also made part hereof for such purpose, by which the entire assets, property, bonds and stock, of the railroad company hereafter to be organized, shall be and are pledged in a suitable way for the repayment of the aforesaid sum of money and interest thereon, together with all other moneys and interest thereon, which may hereafter be paid to secure said property as provided in the said contract first herein mentioned."

To this agreement signed by Sears, Crowley and Clapp, Cooper and Pomeroy appended their acceptance in these words: "We accept the trust hereby created, and agree to perform the conditions thereof."

The contemporaneous paper referred to in this agreement as a declaration of trust bears date the same day, and states that Sears, Crowley and Clapp—as the assignees and representatives of others interested in the contract of the 12th of March 1883, between Dudley and Dean themselves—with a view to the completion of the purchase and to define the interests of the parties therein, propose and agree as follows:

"That whereas the said contract has this day been assigned to Glen W. Cooper and Samuel C. Pomeroy, as trustees, to secure the repayment of \$5,000 already advanced,

now it is further agreed, that the said contract and all the interests therein conveyed to the said trustees, shall be held by them for the benefit of any and all persons who may contribute towards the payment of the \$35,000, being the balance due on the said first named contract.

"It is further agreed that upon the completion of the purchase of the said property by the payment of the said \$35,000, a railway corporation shall be organized under the laws of the State of New York; that in the organization of said corporation the said persons so contributing as aforesaid shall name a majority of the board of directors; that any and all stocks and bonds issued by the said corporation so organized shall be issued and delivered to the said trustees hereinbefore named, who shall hold the same in trust until the said moneys, to wit, the sum of \$5,000 already advanced, and the said \$35,000, and all interest thereon at the rate of six per cent. per annum, shall have been repaid to the parties respectively who have advanced the same.

"Upon the repayment of the said sums of money aforesaid, and the interest thereon, by the sale or negotiation of said stocks and bonds, or otherwise, this assignment shall become void, and the said stocks and bonds shall belong to the parties advancing the \$40,000 as aforesaid, in the proportion of four-tenths of the whole, and five-tenths shall belong to the parties whose interest may then appear, and the remaining one-tenth shall belong to Glen W. Cooper, for moneys already advanced.

"It is further agreed that the subscription for the raising of the \$35,000 aforesaid, shall be paid to the said trustees, who, when the whole amount shall have been paid, shall cause the same to be paid over to the present owners of the said property, and a good and sufficient title to be made to the said railway corporation hereafter to be organized as aforesaid."

This also was signed by the grantors, and Cooper and Pomeroy signified their acceptance of its contents by signing the following:

"We accept the trust hereby created and agree to perform the conditions thereof."

Payne testified, that when these papers were shown to him, they were accompanied by representations made by Cooper and Pomeroy and by an engineer connected with the work, as to the condition of the road; and among other things he was told it was advisable the subscriptions should be in sums of \$5,000, and that a number of them had been promised. After considering the matter, Payne agreed to go into the enterprise. He met the parties, or some of them, in New York, paid his \$5,000 to the trustees, and was given a receipt which is in these words:

"Received of James G. Payne, five thousand dollars, to be applied as part of the purchase money of the property of the late Pennsylvania & Sodus Bay Railroad Company; this money to be refunded to said James G. Payne out of the first money realized from the sale of bonds issued by the Pennsylvania, Lake Ontario & Northern Railroad Company, a corporation to be organized on the basis of said property purchased pursuant to the trust created for the protection of the parties advancing said purchase money in which the undersigned are trustees; said James G. Payne to retain and receive a one-twentieth portion of all bonds and stocks issued by the corporation to be organized as aforesaid, or the proceeds thereof, and of all profits in the purchase, building, operating or sale of said railroad property." Dated New York, April 10, 1883. Glen W. Cooper, S. C. Pomeroy, trustees.

Payne, who was the only witness examined in his own behalf, states that after making this payment he returned to Washington; it being understood Cooper was to see him here as soon as the contract was consummated. Up to that time, the only sums claimed to have been paid in were \$5,000 each by Cooper, Pomeroy and Payne. Payne testified that about a month and a half after this interview Cooper came to see him and said the transaction had been completed, but he was sorry to say, with a slight change of

terms; that Mr. Alley, who had put in \$25,000, was to receive his \$25,000 before we should be reimbursed our contributions to the fund. I stated to Mr. Cooper that that was not the agreement under which I deposited my \$5,000; that the terms were changed, and he had no authority or consent from me to make any application of the \$5,000, other than as indicated in the receipt which he had given me, and the written contract which I had seen. He said that was true, but that they had not time to confer with me about it, and that he did not think it would make a great deal of difference, as the property was so valuable. I told him that I had entered into the scheme with some hesitation, feeling that in any event some portion of the \$5,000 would come back if the contributors were all upon an equal footing, when, as the matter had been consummated, they were not on an equal footing, as I was subordinated to Mr. Alley, whom I had never heard of, and I was not willing to stand by such an agreement. Mr. Cooper then requested me to do nothing, stating: "I am responsible for getting you into this thing, and I will find some one to take your place." We had several conversations of a similar character, and on one occasion Mr. Cooper named a party I did not know, but whom he was endeavoring to induce to take my place in the scheme and refund me my money."

"Later in that summer, Mr. Cooper informed me that the railroad organization had been effected, or was about to be effected, and directors elected, and that it would be necessary for those who had contributed to the fund to put up money to pay certain expenses. I stated to him that I did not consider myself as in the scheme at all, and so felt under no obligations myself to contribute any. I think then we had some correspondence in regard to the matter, and some personal interviews, also, in which he stated to me that if I would advance the money, he would refund it to me himself; that he was not able at that time, by reason of demands upon his financial means, to do it, but that he would like to have me do it, pending the efforts that

he was then making to get some one to take my place in the concern. I did send a check, either gave it to him or sent it to Mr. Jordan in New York. He was the treasurer, and his name was given by Mr. Cooper." "I did not attend any meeting of the directors in New York. Mr. Rice said I attended a meeting before any of the assessments were made. I never attended a meeting of the directors in my life. My business was with Messrs. Cooper and Pomeroy. I never had notice of any meeting, and had no reason to attend any meeting, as I was not a director. Two other assessments were made and checks given by me under the same circumstances and on the same terms, that Mr. Cooper was to have an opportunity of getting some one to take my place, and that he would refund the money if I wished it."

In a letter dated 5th of August, 1883, from Cooper to Payne, on the subject of these assessments, he writes: "If you have not already sent your \$65 to the treasurer, I hope you will on receipt of this. If I had not so much demand for money, I would pay it; but I will, if you desire, insure its return to you if you should wish to dispose of your share."

Payne also stated he insisted he had nothing further to do with the matter, but influenced by the statement of Cooper that he was making an effort to relieve him by selling whatever interest he had to somebody else and that he was not in financial condition to pay this assessment but would guarantee he would return it, he paid the first assessment and afterwards paid two others, one of \$50 and another of a smaller amount, all by checks of Payne in favor of Jordan, treasurer, New York. That up to this time not a word had been said by Cooper indicating there had been any conveyance made to Alley, nor that there had been any change from the terms of the trust, except as to Alley's preference; nor had he been shown the contract with Alley and the trustees; and not until June 1884, did he become aware that an absolute conveyance had been made of the property, not to a corporation, but directly to Alley.

He also testified, that at the time last named Cooper showed him a notice from Alley and Sperry to the trustees,

and also a copy of the contract made with Alley under which he agreed to advance money to the trustees to complete the payment for the option. This agreement, bearing date the 2d day of May, 1883, is between John B. Alley, of the first part, and Samuel C. Pomeroy, Glen W. Cooper, and R. W. Clapp, of the second part, and recites that the parties of the second part, on the 7th day of April, 1883, entered into a contract or agreement with Dudley and Dean, whereby the latter obligated themselves to sell to Pomeroy, Cooper and Clapp, all the property, real and personal, together with all franchises lately belonging to the Pennsylvania and Sodus Bay Railroad Company, for the sum of thirty-five thousand dollars, in addition to five thousand dollars previously paid, and declares that "in consideration of the transfer and assignment this day made by the parties of the second part of the said contract, to said party of the first part, he, the said party of the first part, agrees to pay said Dudley and Dean, upon being satisfied that they have good and sufficient title to said aforementioned property, and upon their conveying said property to said party of the first part, by good and sufficient and unincumbered title, twenty-five thousand dollars. And said party of the first part further agrees, that after being paid from the proceeds of said property said sum of twenty-five thousand dollars, with interest at six per cent. per annum, he will next pay to said parties of the second part, so much as may be further realized from the disposition of said property, not exceeding the sum of fifteen thousand dollars, with interest. And it is still further agreed that after realizing the aforesaid sum of forty thousand dollars, with interest, the further proceeds of said property shall be divided equally between said parties of the first and second part, one moiety to the party of the first part and one moiety to the party of the second part. Given under our hands and seals the day and year above written.

Witness :

JOHN C. RICE.

JOHN B. ALLEY,	[SEAL]
SAML. C. POMEROY,	[SEAL]
GLEN W. COOPER,	[SEAL]
R. M. CLAPP.	[SEAL]"

By a paper dated May 9, 1883, one Sperry was admitted to take a one-half interest with Alley, subject to the condition that he would pay one-half of the \$25,000, and Alley the other half. Indorsed on that paper is the following: "We assent and concur in the arrangement between Messrs. Alley and Sperry," which was signed by Pomeroy and Clapp. The other paper was a notice addressed to Pomeroy, Cooper and Clapp, and signed by Alley and Sperry, dated June 20, 1884, giving them notice they desire a return of the money they have advanced, and will sell to the three persons named, at any time within twenty (20) days from the date thereof, all said property and franchise, upon the payment of the money so advanced, with six per cent. interest; and if they shall fail to take and pay for the same within said time, that Alley and Sperry will proceed to sell it to any other person for the best attainable price.

Cooper also brought with him another paper, which he wanted Payne to sign, notifying Alley that Mr. Payne had put \$5,000 into the scheme, and had a claim to that extent. Payne declined to sign the notice, stating that he had nothing to do with Sperry and Alley. He says he then for the first time became aware that Alley's contract was not made with the contributors to the fund at all, as the original contract was, but with Pomeroy, Cooper and Clapp, who alone were to get the \$15,000, if anybody should get it. He declined to sign the paper, or to have any communication with Alley, in any form, and Cooper left.

Afterwards, July 7, 1884, Cooper wrote to Payne, stating that he had thought it best to again notify Alley and Sperry of his, Payne's, interest, by calling their attention to the provision for a refund of \$5,000 and interest to Payne in the original contract prepared by Mr. Rice, to be signed by Alley, "and which provisions Mr. Alley omitted when he re-wrote the contract, as I told you at the time. I told Mr. Alley that he thus had notice of your interest before he signed the contract."

Payne says that immediately upon receiving this letter,

he wrote a reply in which he told Cooper he was mistaken in his statement that he had told him at the time that Alley had omitted his, Payne's name, when he re-wrote the contract, and said: "You did not tell me of the omission until many months after the transaction. You then suggested that Mr. Alley ought to know that I had put up money for the purchase. I have no claim on Mr. Alley, as you know. I look to you and Mr. Pomeroy for my money."

Payne says Cooper never succeeded in getting any one to take his place; that there was some more conversation or intercourse between the parties, but the result of it all was that Payne brought this suit in 1885.

It appeared also that the money which was paid by Payne to the trustees was applied to the purpose of securing the option before there was any certainty on their part that Alley or any one else would make the payment of \$25,000, and therefore, there was a liability of its being entirely lost, because Alley might not have entered into it, and the entire scheme might have fallen through.

We have quoted thus fully from the documents and testimony of Payne, as the simplest mode of presenting the contentions of the plaintiff. The defendant's position may be stated more briefly.

The witnesses on the part of the defence are Mr. Cooper and Mr. Pomeroy. Cooper contradicts Payne as to almost every statement involving the contested points of the case. He declares that after Alley's advance of the money, he told Payne in the first conversation, of the conveyance to Alley and gave him full information of everything that had occurred; that he also told him the company had been organized and a board of directors was to be appointed soon, and consulted him as to whether or not he would agree to serve in that capacity; that he consulted Payne, as he would have done any other person interested in the enterprise, stating to him that the laws of New York required that at the organization the directors must be citizens of the State, but that the figure-heads could pass out, and Payne could

then be elected; that every attendance at a director's meeting would cost \$25; that Payne declined the position; that Payne was in error in stating that when the assessments were made he, Cooper, was in any financial difficulty, which would have prevented him from advancing the money; that he understood when Payne drew the checks to the treasurer of the company he was paying assessments on his own account, as any person having stock in the company, and considering himself a member of it, would have done.

Mr. Pomeroy is examined upon the single point that he had given Payne information of the conveyance to Alley shortly after it was made. He stated he met Payne in front of the Ebbitt House soon after the negotiations were concluded in June 1883 (and, of course, before the date, June 1884, at which Payne says he first heard the particulars of the contract with Alley and the conveyance to him), and then spoke to him of the fact that Sperry had taken one-half of the Alley interest and had paid one-half of the \$25,000, and that Alley and Sperry had received at that time a conveyance. Pomeroy reiterated several times in his testimony that he certainly talked with Payne at the time indicated about this conveyance—all of which Payne in rebuttal denied.

The case went to the jury on this conflict of evidence, and a verdict was given for the plaintiff. It comes here upon a case stated, as well as upon a number of exceptions to the rulings and charge of the court.

The first exception is to an instruction given by the court below at the request of the plaintiff, in these words:

"If the jury find from the evidence that the plaintiff entrusted to the defendants the money sought to be recovered from them in this action for the purpose of being employed in the purchase of the property of the Pennsylvania and Sodus Bay Railroad Company in accordance with the plan and in pursuance of the objects set forth in the agreements between the defendants and Sears, Crowley and Clapp, which have been introduced into evidence, and that the de-

defendants, without the authority or consent of the plaintiff, used the said money in making a purchase thereof, upon the terms and under the stipulations disclosed by the agreement between themselves and John B. Alley, their verdict must be for the plaintiff, unless they further find that the plaintiff, after having been fully and fairly apprised of the material particulars in which the defendants had departed from their authority in making the said purchase, ratified or consented to their said action; and upon the question of ratification the burden of proof is upon the defendants."

Counsel for the defendants insist the instruction was erroneous: first, because the arrangement with Alley, which is said to be inconsistent with the original contract stated in the receipt, is not a matter of importance in this case, since it does not undertake to exclude Payne, and could not therefore injure any rights previously acquired by him, and that Payne would still get the \$5,000, or one-third of the \$15,000 despite the Alley contract.

But the contract with Alley is explicit that the \$15,000 is to go to Pomeroy, Cooper and Clapp, and Payne is not mentioned in it at all.

Next it was insisted it was unimportant whether Alley and Sperry organized the company, or whether the trustees did so, and hence any incompatibility between the two agreements in that respect is of no consequence.

But there remained no guarantee, after the trustees had parted with their title to Alley, that Alley would make any organization. He was not required to do so by the contract, and as the trustees had abandoned their duty and abdicated their power in this respect, there could be no assurance it would be done.

Next, it was contended that, as Payne was only to get his five thousand dollars out of the bonds and stock, to be issued by a company, and as a company had been since organized, the bonds and stock could still be issued, and he could still get his \$5,000 from that source.

But again the reply is, there remained no guaranty that

the incorporation, so organized, would ever issue any bonds for the purpose indicated. By the Alley contract, Alley was to be paid his \$25,000 in advance of all others. But it is said, Alley could not enforce this provision because the Alley agreement could not interfere with the legal operation of the railroad law upon this organization thus made, which would not recognize such a preference. This is, in effect, an attempt by the trustees to defend themselves for their breach of duty, by saying the agreement they made with Alley, being one he might not be able to enforce, was but a clumsy breach of trust and therefore their conduct was venial; and that the chance of Payne's being finally reinstated in his rights by a suit at law, is the equivalent of the preservation of his original rights, unimpaired.

The plaintiff was not obliged to wait to ascertain whether his rights might ultimately be secured to him. As soon as the defendants had disenabled themselves from performing their obligation, his right of action accrued.

This principle is recognized in actions for breach of promise of marriage, where the defendant has married another person, and thereby incapacitated himself from complying with his contract to the plaintiff. No request to marry need be shown under such circumstances, and it is improper to allege it. 2 Saunders Pleadings and Evidence, 346; Chitty on Contracts, 538. In 15 M. & W., 189, Cairnes *vs.* Smith, which was an action of that description, the court illustrates the propriety of its application thus: "If a man, being under contract to deliver certain goods to another, should put it out of his power to do so by destroying them, it cannot be necessary to request him to do so." 8 Adolphus & Ellis, N. S., 358. In 23 Pickering, 455, Heard *vs.* Bowers, the court said: "The general doctrine undoubtedly is, where a party stipulated to make a conveyance of an estate to another at a future day and before the day conveyed the estate to a third person, he is to be considered as guilty of a breach of his stipulation, and is liable to be sued before the day arrives. So although he should re-purchase the same

estate before the day appointed for the performance of his contract, he would still be liable for a constructive breach of his contract, and he could not compel the other party to perform it on his part.

"In 6 Barnwell and Creswell, 327, it appeared that A. stipulated that he would, as soon as he became possessed of a public house, execute a lease thereof to B., from a designated date, for a specific term of years. At the time of making the agreement, the house was under lease, which would not expire until after the date named, and the legal estate was in trustees, who were to hold it for the use of A., after he attained twenty-four. At the designated date, and after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees joined in a lease to C. for a long term. *Held*, that A., having thereby put it out of his power, so long as the latter lease subsisted, to grant any lease to B., had committed a breach of that agreement, although the first lease had not expired."

We think the instruction was correct and properly guarded.

The first prayer of the defendants was:

"If the jury find from the evidence that after the organization of the company referred to in the receipt which has been given in evidence, and after the plaintiff had information of the contract with Alley and Sperry, and of the conveyance to them, and if you further find that said assessments were made by the company against the parties in interest, the plaintiff included, and that the plaintiff paid such assessments, then he must be deemed to have waived any and all objections to the transfer to Alley and Sperry and you should find for the defendants."

The justice below, in our opinion, very properly amended the prayer by striking out the words "then he must be deemed to have waived any and all objections to the transfer to Alley and Sperry, and you should find for the defendants," and substituting therefor the words "then such payments may be considered as evidence tending to show that

the plaintiff waived any and all objections to the transfer to Alley and Sperry, but must be considered in connection with all the other testimony on this subject."

The prayer as presented was faulty, because it instructed the jury that the bare fact of the payment of the assessments would operate as a waiver of all objection to the transfer to Alley; excluding from their consideration all the evidence as to Payne's reasons for making the payments and the terms upon which they were made; which exclusion would have had a direct tendency to mislead the jury.

The defendants insist this modification left to the jury the determination of the legal effect of the evidence as to the alleged waiver.

But the instruction, as presented, was obnoxious to the same objection. In its original form it proposed to tell the jury if they found the payment of the assessments, that bare fact, in law, absolutely established a waiver. As modified, it told them, if they found the payment, the finding of that fact would, in law, tend to prove a waiver, but must be considered with all the other testimony on the subject. There was no more submission of the legal effect of the evidence in the one case than in the other. The effect of the change was, that the court by the amendment attached the proper probative value to the fact, instead of defining that probative value incorrectly, as was proposed by the instruction originally.

The second prayer of the defendant was:

"If the jury find from the evidence that the plaintiff had knowledge of the conveyance to Alley and Sperry before the organization of the new company, and made no objection to the conveyance to Alley and Sperry, and did not signify any objection to such organization, he must be deemed to have waived any objection to the arrangement made with Alley and Sperry, and they should find for the defendants."

This was so amended by the court as to require the jury to find that if the plaintiff, after knowledge of the conveyance to Alley and Sperry, before the organization, "acquiesced in the same, and having knowledge of the proposed

organization, did not signify any objection thereto," before the plaintiff could be deemed to have waived any objection to the arrangement made with Alley and Sperry. The all-important requirement that the jury should find the plaintiff had knowledge of the proposed organization was entirely left out of the original prayer. The court properly declared such knowledge should appear before he would be affected by it. But as his right of action was complete as soon as the trustees had abandoned and abdicated their duties and powers, and thus disenabled themselves from complying with the conditions upon which alone Payne entrusted his money to their charge, the instruction was unimportant.

The third prayer of the defendant is:

"The jury is instructed that the organization of the company, as evidenced by the articles of incorporation, operated as a transfer of the property to the new organization and was a compliance with the duties of the defendants as trustees, and under the terms of the receipt in evidence the plaintiff must look to the provisions made therein for reimbursement, and you should find a verdict for the defendants."

This prayer was properly rejected: first, because the incorporation could not operate to blot out all paramount liens against the property existing before the incorporation for the payment of the purchase money; and second, because the trustees having expressly agreed to hold the title of the property until the organization of the new company, and then convey it to that corporation, after the preference claims of all the contributors had been discharged pro rata as expressed in their agreement, could not be absolved of their obligations by the filing of the certificate of incorporation. When the trustees parted with their power to perform their contract with the plaintiff, their liability was fixed, and the subsequent conduct of those in whose favor they had abandoned their trust could not absolve them from the consequences of their breach of duty.

The fourth prayer of the defendants is:

"Outside of specific evidence of notice by the defendants to plaintiff of the conveyance of the property to Alley and

Sperry, and by them to a railroad company, the filing of the articles of incorporation by them reciting the ownership of the property, was notice to the world and to the plaintiff that the title which had been and was in them was thereby vested in the new railroad corporation."

It is impossible the bare filing of the articles of association of the New York Northern Railway Company in the office of the Secretary of State in Albany could be "notice to the world and to the plaintiff" that the title that had been in Alley and Sperry was thereby vested in the new railroad company. No authority was shown in support of this proposition.

Besides, as the right of action had accrued as soon as the trustees had, in violation of their duty, conveyed the property to Alley and Sperry, the alleged organization became immaterial to his rights to recover.

The fifth is:

"If you find that by the agreement the defendants were to cause the property to be conveyed to a railroad corporation thereafter to be organized, when the stocks and bonds were to be pledged in a suitable manner for the return of the purchase money, and you find that it was so conveyed and that no stocks or bonds have been issued by it, then the defendants are not liable in this action."

This prayer left the jury to find that the property was in fact conveyed in the manner contemplated by the agreement under which the defendants were trustees, though there is no denial that the reverse is the fact in many particulars. It assumes that the New York Northern Railway Company named in Alley's incorporation is the same with the Pennsylvania, Lake Ontario & Northern Railway Company named in the receipt to Payne, of which there is no proof; and that the purchase money under the Alley contract was to be returned to the subscribers in the same manner as was provided in the agreement with defendants, which is the reverse of the fact. It assumes that the alleged incorporation provided for the issue of bonds and stock for the purposes of the agreement with the plaintiff and the con-

tributors generally, although the incorporation contains no such provision. Finally, it assumed that the liability of defendants to plaintiff, already fixed by their conveyance to Alley and Sperry, could be annulled by the subsequent act of incorporation.

It does not appear how far it may be important, but the fact is, that in the receipt given by the trustees to Payne it was stipulated that the organization to be made was to be called the Pennsylvania, Lake Ontario & Northern Railway Company, and that in the record there appears the route of the original railroad, which began at a place called Spencer, in Tioga county, one of the southern range of counties of New York, and running thence to a point on Lake Ontario. Under Alley's incorporation, as it may be called, the starting-point is at a place called Waverly, on or near to the Pennsylvania line, and the route seems to be different. But it is enough to say that it is not shown here that the two routes are identical and substantially the same.

These constitute the prayers offered in behalf of the defendants, and we think each was properly rejected as offered.

The next exceptions are to various parts of the charge, indicated by being placed in brackets.

First, it is contended the court repeatedly assumed the province of the jury by pointing out the particulars in which the transfer to Alley and Sperry operated as a departure from the contract with Payne. Undoubtedly the presiding justice did assume, in the instances pointed out, to make such statements; but we do not doubt his action in this respect was entirely proper. He was comparing and contrasting written documents, and it was his right and duty to state to the jury their meaning and effect upon each other.

The general principle justifying such action is elementary. 1 Greenleaf Evidence, Secs. 49, note 3; 177, note E; 1 Taylor Evidence, Sec. 36.

Where the writings contain peculiar words of art, or phrases used in commerce or trade, the determination of the meaning of such words or phrases should be left to the

jury; but subject to this ascertainment by the jury it is for the court to decide the meaning of the instruments. Thus it is the function of the judge, upon a comparison of two sets of specifications annexed to competing claims to patents to decide whether either is void for want of novelty. The necessity of such a rule must be recognized when it is considered how little adapted twelve men in the jury box, inexperienced in scanning papers, and some of whom may not be able to read them, would be to decide whether or not one writing, by its legal effect, countervails or is repugnant to others; while its justice is apparent when it is remembered that if the inquiry were left to the jury, there could be no appeal from their misjudgment; while an error in this respect by the court can be reviewed on appeal.

This exception was addressed rather to the authority of the justice to state to the jury the points of repugnancy between the writings than to the correctness of his criticism. We have compared the instruments to see whether his interpretation of their scope and meaning, in the particulars pointed out in his charge was correct, and we have no hesitation in saying that it was. It is not necessary to go through what he said to show this, though the demonstration would be easy.

The remaining question of importance is as to this remark in the charge:

"Of course, when a man pays his money to another person to be applied to certain purposes, and it is applied to another purpose, the plain common sense and the law of the matter is, that he has a right to reclaim his money; and on this showing, if nothing else appeared in the case, Col. Payne's right to recover would be very plain."

The defendant's counsel says this must have been intended to inform the jury, by the words "if nothing else appeared in the case," that notwithstanding all the other evidence, if they believed Payne had paid his money for one purpose, and the defendants had applied it to another, Payne was entitled to recover.

But such is not the correct significance of the language. As we conceive, those words plainly mean "unless something else appears in the evidence to combat the proof of the misapplication of money." That seems to be the only fair and sensible construction of the words, and that ascribed to them is a perversion of their meaning. There are few sentences which when read with certain emphasis and pauses may not present a meaning quite different from that intended; but this expression is not readily susceptible of such a change of meaning.

The court had plainly informed the jury it was essential to Payne's recovery, that it should appear there had been no waiver or acquiescence on his part of the important departures in the Alley contract from the provisions of the previous contracts under which Payne had become a subscriber. The justice immediately says it is insisted something else does appear in the case, which, if true, would destroy Payne's right of recovery; and he takes up *seriatim* the contentions and evidence of the defendants and places in opposition the testimony of the plaintiff, and leaves to the jury the determination as to which of them they should give credit. It would be most unjust to say, even if there were any obscurity about this particular sentence, that he should, by that sentence, be understood to have annulled the greater part of what he said in his charge.

We are asked on consideration of the case stated to reverse upon the ground that the verdict is against the evidence. It is unnecessary in this case to invoke the rigorous rule we have laid down as to the degree of force in the evidence which we would require to cause us to reverse a verdict given by a jury and approved by the justice who heard the testimony. We think the jury were quite justified to render the verdict they did, by the evidence in the record. The court told them distinctly there was a conflict of evidence, and it was their duty to decide between the witnesses. As they saw fit to decide in favor of the plaintiff, we have no fault to find with their verdict.

The judgment is affirmed.

JAMES A. HOFFECKER, JR.

vs.

EDWARD B. MOON ET AL.

PROMISSORY NOTE; JOINT ACTION; DECLARATION.

1. Under Sec. 827, R. S. D. C., a joint action is maintainable against the maker and endorser of a promissory note.
2. Where in a declaration on a promissory note, it is alleged that demand was made at maturity, and the time of maturity is shown, a demurrer on the ground that the date of the note was not given, is frivolous.

At Law. No. 32,266. Decided November 21, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the defendants from a judgment for the plaintiff, overruling a demurrer to a declaration on a promissory note. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. MCGREW & SMALL for defendants (appellants).

Mr. R. F. HILL for plaintiff (appellee).

Mr. Justice JAMES delivered the opinion of the Court:

This is a suit against the maker and endorser on a promissory note. The declaration runs in these words:

"The plaintiff, James A. Hoffecker, Jr., sues the defendant for money payable by the defendant to the plaintiff, for that the defendant, Edward B. Moon, on the 17th day of February, 1891, by his promissory note now overdue, promised to pay the defendant, Llewellyn G. Estes or order, at the Columbia National Bank, of Washington, D. C., the sum of fifteen hundred dollars, ninety days after date, with interest at six per cent., and the said payee endorsed and delivered the said note to the plaintiff before due for a valuable

consideration, and the said note was, at maturity, duly presented for payment, and was dishonored, whereof each of the defendants had due notice; but the said defendants did not, nor did either of them, pay the same."

Then follow the common counts.

The particulars of demand are the promissory note in the suit.

To that declaration the defendant demurred, and his memorandum is: "1st. Matter of form: misjoinder of action; and, 2d. Matter of substance, the date of note referred to not being given, nor the date when it was protested and notice thereof given to defendant Llewellyn G. Estes."

As to the misjoinder of action, section 827 of the Revised Statutes distinctly allows a joint action against the maker and endorser of a promissory note. This is not a question of separate contract. The language of the statute is a little peculiar. It says: "Where money is payable by two or more persons, jointly or severally." Where money is payable by each of several persons, although their contracts be several, they may be joined in the action.

In this case, money was payable by these parties in the very manner described in section 827. That is called matter of form. It is not, but if it were, a demurrer would not apply to such matter.

The next ground of demurrer is that the date of the note referred to was not given, nor was the date when it was protested and notice given to the defendant stated in the declaration. We think that is perfectly stated in the declaration by saying the demand was made at maturity, and the time of maturity is shown.

There is no ground at all for this demurrer, and it really is frivolous. It is only because a great many cases of frivolous resistance have been passed in silence that we forbear to apply the rule which provides for adding damages. This prolongation of suits on entirely frivolous grounds is an evil which ought to be met in that way; but as I stated, we have never applied the rule, and do not do it now.

It is, however, very important that this should be done. There are so many appeals to this court, taking up its time, upon frivolous grounds, that I think some action should be taken in regard to it. To allow the delay of payment of debts by mere trifling objections is not the proper administration of justice.

JAMES M. YORK vs. RICHARD W. TYLER ET AL.

SAME vs. EMMA J. BREWER ET AL.

SAME vs. GEORGE L. KNOWLES ET AL.

EXCEPTIONS TO AUDITOR'S REPORT.

1. Mere general exceptions to the findings of the auditor, without specifically stating the grounds therefor, and setting forth the very evil complained of, are insufficient, and will not be regarded by this court on appeal.
2. The auditor of this court sustains a relation to it similar to that which a master in chancery ordinarily has to a court of equity, and the same consideration should be given to his report and exceptions, as should be given to reports made by masters in chancery.
3. The auditor's findings are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, they will be permitted to stand.

Equity. Nos. 9,104, 9,105, 9,106 consolidated. Decided November 21, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the defendants from a decree affirming a report of the auditor. *Affirmed.*

The facts are stated in the opinion.

Mr. W. H. SMITH for defendants (appellants).

Messrs. IVORY G. KIMBALL and WM. T. S. CURTIS for plaintiff (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

The bill in the case of York against Tyler seeks to enforce a mechanics' lien, and alleges that on the 18th of August, 1883, the plaintiff entered into a contract with the defendants, Tyler & Rutherford, described in the said contract as agents, to build and construct seven houses upon seven sub-lots in square 115, in this city, for the sum of \$30,800; that the plaintiff proceeded to perform the contract on his part, and while so performing and carrying out the same, on the 8th of October, 1883, the defendants, Tyler & Rutherford, took possession of the buildings so being erected, dispossessed the plaintiff and refused to allow him to proceed with his contract, and thereupon proceeded to complete the work themselves; that at the latter date materials had been furnished and labor performed by the plaintiff upon all of the said houses, and some payments had been made by the defendants, Tyler & Rutherford, on account of such work and materials, leaving a balance due to the plaintiff; that at the date of the contract, four of these lots, 69 to 72, inclusive, were owned by the defendant Tyler; another lot, 73, by Emma J. Brewer, and two others, 74 and 75, by George L. Knowles and Joseph A. Jones, as tenants in common; that on the 24th of November, 1883, plaintiff filed his notice of lien on the first four mentioned lots and premises in the name of Tyler & Rutherford, as owners, and subsequently on the 12th of July, 1884, filed another such notice of lien against the said lots in the name of Richard W. Tyler as owner. There are other averments in the bill which are not material to the stating of this account. The original answer of the defendants, Tyler & Rutherford, admits the making of the contract and partial execution of the work; also the taking possession by them on the 8th of October, and their refusal to allow the plaintiff to proceed, and that they finished the said work. This answer also assigns as

reasons for the said acts, that the plaintiff had failed to comply with the terms of the contract and requirements of the plans and specifications. The defendants also state that the necessary cost of completing the buildings exceeded the original contract price. Exceptions to this answer were filed and sustained by the court, and thereupon the said defendants filed an amended answer, in which they aver that the plaintiff did not comply with his said contract, in the following among other particulars: That the workmanship by the plaintiff on the said buildings was not true, perfect, or thoroughly workmanlike and according to the plans and specifications as required by his contract; that the materials were not good, proper or sufficient, or of the best description as required by the said contract, and that neither workmanship nor materials were satisfactory to the architect as required by the said contract; that the plaintiff delayed entering upon the said work for several weeks after the execution of the contract, and then failed to give it proper personal superintendence, or to cause the work to be done in the manner required by the contract. It is further specified that neither the bricks nor mortar were of the description required by the specifications, that the walls were not constructed in accordance therewith, nor were the joists or bridging of the description required, and that the workmanship and materials were in other ways deficient and defective. It is also averred in the answer that by reason of the plaintiff's determination not to comply with the contract, and the slow progress of the work and the confusion attending the same, it was apparent that the houses would not be completed within the period provided for in said contract; and that the plaintiff had suspended work for want of means to carry it on.

The plaintiff brought similar suits to enforce similar liens in causes Nos. 9105 and 9106. Proofs were taken, and by stipulation are to be used in the three causes. A copy of the contract of August 18, 1885, is filed as an exhibit to the bill. The agreement was made between the plaintiff, as

builder, of the one part, and Richard W. Tyler and Robert G. Rutherford, agents, of the other part. The plaintiff agreed that on or before the 1st of February, 1884, he would well and sufficiently erect, finish and deliver, in a true, perfect and thoroughly workmanlike manner, seven three-story and basement brick dwelling-houses as per plans and specifications to the contract attached and signed by the parties, and dated the same as the agreement, on ground situated in this city, and agreeably to the plans, drawings and specifications aforesaid, prepared for the said houses by John G. Myers, architect, to the satisfaction and under the direction and personal supervision of the said Myers, architect, and to find and provide such good, proper and sufficient materials of all kinds whatsoever, as should be proper and sufficient for the completing and finishing of the said houses within the time aforesaid, for the sum of \$30,800. The parties of the second part agreed, in consideration of the execution of the agreement by the party of the first part, to pay to him the said sum in certain specified instalments or payments, as the work reached certain points in its progress; the first payment, \$2,000, to be made when the basement walls were up to the first tier of floor joists, leveled up and bridged. The contract further provides that in each case of such payments a certificate should be obtained from the architect. The contract contains a number of other provisions, of which we may refer here to the fourth, ninth and tenth. The fourth provides as follows: "Should the contractor, at any time during the progress of said work, become bankrupt, refuse or neglect to supply a sufficiency of material or workmen, or cause any unreasonable neglect or suspension of work, or fail or refuse to follow the drawings and specifications, or comply with any of the articles of agreement, the proprietors (parties of the second part) or their agent, shall have the right and power to enter upon and take possession of the premises, and may at once terminate the contract, whereupon all claims of the contractor, his heirs, executors, administrators or assigns, shall cease and

the proprietors may provide materials and workmen sufficient to complete the said works, after giving forty-eight hours' notice in writing, directed and delivered to the contractor, . . . and the expense of such notice, and the completing of the works will be deducted from the amount of contract or any part of it due or to become due to the contractor," etc. The ninth clause provides, among other things, that all work and materials as delivered on the premises to form part of the works are to be considered the property of the proprietors, and are not to be removed without their consent. The tenth clause provides that if the contractor fails to finish his work at or before the time agreed upon he should pay or allow the proprietors, by way of liquidated damages, the sum of \$35 per day for each day the work remained incomplete or undelivered.

The specifications in general terms required that all material should be of the best description; that the contractor should furnish all material and do all necessary work to complete the buildings, whether specified or not, excepting certain things which were specifically omitted; no changes were to be made without previous agreement, and that the plans and drawings should form a part of both contract and specifications.

Replication was made to the answers of defendants. Testimony was taken, and the cause referred to the auditor to state an account between the parties. The auditor made his report, in which he passed upon the several alleged defects in the performance of the contract on the part of the plaintiff, as mentioned in the amended answer, and some in a letter which was written by the architect to the plaintiff on the 5th of October, three days before the letter was written and notice given by the defendants and served upon the plaintiff which terminated the contract and dispossessed the plaintiff, and also some defects which it is claimed by the defendants appear in the evidence produced by them.

After passing upon all these matters in his report, the auditor states an account between the parties, in which he

finds to be due from the defendants, Tyler & Rutherford, in the first action, No. 9104, the sum of \$2,146.44, on account of labor performed and materials furnished to the four buildings involved in that action.

In the next case, that of York against Brewer, No. 9105, he finds to be due from the defendants to the plaintiff, \$399.35. In the case of York against Knowles, Jones and others, No. 9106, the auditor finds to be due from the defendants to the plaintiff the sum of \$798.72.

To this report and finding of the auditor, the defendants in each of the causes excepted, as follows:

No. 9104. First, they except to the allowance by the auditor to the plaintiff of \$1,226.34, for work done and materials furnished on houses on lots 69, 70, 71 and 72, in square 115.

Second. They excepted to the allowance by the auditor to the plaintiff of \$499.34 as due him on account of excess of work on said houses.

Third. They except to the allowance of the auditor to the plaintiff of \$370.39 on account of materials set forth in said Schedule A.

And said defendants, Tyler & Rutherford, aver in each of their said exceptions that each of said findings and certifications of the auditor is not supported by the evidence in said cause; and further, said auditor ought to have found there was nothing due to said plaintiff.

In cause No. 9105 the exceptions are precisely the same as in the previous case, with the exception that the amount is less; and the same is true of cause No. 9106.

Our first suggestion is in regard to the character of the exceptions. We think they are altogether too general. They are simply as to the amounts found due from the defendants to the plaintiff. There are no exceptions to the finding of the auditor as to the defects which they allege in their answer existed in the workmanship of the plaintiff and in the materials which were furnished by the plaintiff.

Only recently, in the case of Haller *vs.* Clark, *ante*, p. 128,

we had occasion to remark upon the character of exceptions of this kind to the auditor's report. We understand that the auditor of this court sustains a relation to it similar to that which a master in chancery ordinarily has to a court of equity, and that the same consideration should be given to his report and exceptions, under a reference like the one made in this case, as should be given to reports made by masters in chancery. It has been held repeatedly by the Supreme Court of the United States that a general and indefinite exception to a report of a master in chancery ought not to be regarded by the court; that such an exception, for instance, as only means that the whole report is wrong, that it ought to be exactly the reverse, instead of pointing out definitely in what respect it is wrong, ought not to be regarded by the court. If the master has made a mistake in construing the evidence, in the application of the law, or in his finding upon some particular fact that is of importance in the decision of the case, the same should be definitely specified in the exception.

In other words, the exception should be definite and specific, and go to the very evil complained of by the party filing the exception. Otherwise, it should be disregarded by the court entirely.

This position is sustained by *Harding vs. Handy*, 11 Wheaton, 126, and in *Story vs. Livingston*, 13 Peters, 365.

We desire again to emphasize the importance of reform in this respect.

We have, notwithstanding the imperfect character of these exceptions, proceeded to examine the case, following the arguments of counsel as if their exceptions reached all the matters of difference between the parties upon the hearing before the auditor.

The real question at issue between the parties is stated by the auditor on page 8 of his report to be as follows:

"The primary and pivotal question here is whether the act of the defendants in taking possession of the premises and refusing to allow the plaintiff to proceed with the work was lawful and justifiable?"

This is practically conceded by counsel for the defendant on page 11 of their brief to be the real contention. After discussing the authorities which relate to the right of a party to bring an action to recover for work done, labor performed or materials furnished upon a contract that has not been fully performed by him, they claim in their brief that under the weight of authority no such right exists on the part of the plaintiff, and that "These authorities, we think, establish the doctrine that a person who has not performed his contract cannot recover."

"We maintain that the present is that case; that the plaintiff did not perform or comply with his contract, and is therefore in the condition of one who sues on a contract which he himself has not kept. Our contention is that the testimony will show this non-compliance. If it does not, then we take nothing from the above rule of law."

It will be seen, then, that the auditor substantially adopts the position which the defendant, in his brief concedes; and he proceeds in his report to examine the evidence relating to each one of the specifications of defective performance on the part of the plaintiff, and gives his conclusion. So that there is really in the case for our consideration no question of law. This leaves only issues of fact, whether the evidence sustains the averments by defendant of defective workmanship and materials, or whether it shows that plaintiff substantially complied with his contract, and was not in that respect in default at the time that the defendants saw proper to give the notice which terminated his performance of the contract.

The auditor has, as we think, very carefully examined the evidence applicable to the determination of the several matters of contest between the parties, and has come to a rational, sensible and just conclusion in relation to all of them. His conclusion is, that as to all of these alleged shortcomings and defective performances on the part of the plaintiff, the defendants have failed to establish them or any of them by a preponderance of evidence to his satisfaction.

Upon reviewing the case, we are of opinion that the auditor has not erred in this conclusion.

When we come to the amounts which have been stated by the auditor as being due from the defendants to the plaintiff, there is hardly any room for controversy, because it is not contended seriously by the counsel for defendants that if they fail to establish their right to terminate the contract, they are not under obligation to pay the fair value of all the work performed and materials furnished by the plaintiff under the contract; and it is not alleged or claimed by counsel for the defendants that if the plaintiff is to be allowed the value of these materials and for this work—if he is not held to be in default—the values fixed by the auditor are excessive.

We may again call the attention of the bar to the auditor's findings in a report of this character, as has been repeatedly defined by the Supreme Court of the United States. We find that in the case of *Crawford vs. Neal*, 144 U. S., 585, the doctrine is repeated by Chief Justice Fuller. In delivering the opinion, he says:

“The cause was referred to a master to take testimony therein, ‘and to report to this court his findings of fact and his conclusions of law thereon.’ This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.”

Citing: *Tilghman vs. Proctor*, 125 U. S., 136; *Kimberly vs. Arms*, 129 U. S., 512; *Evans vs. State Bank*, 141 U. S., 107.

In the next volume, 145 U. S., 132, in the case of *Furrer vs. Ferris*, the Supreme Court had the same question before them, and reaffirmed *Crawford vs. Neal*.

We think it entirely a work of supererogation to spend an hour or more, as would be required even in a very ab-

breviated way, to follow the auditor in his findings in detail upon the question of the performance of the contract on the part of the plaintiff. We have carefully examined the whole case, and think, as shown here by the record, it should not for any reason presented be disturbed.

The decree of the court below affirming the auditor's report will be affirmed.

MARGARET BARRETT ET AL.

vs.

DENNIS BYRNE ET AL.

CURTESY ; PARTITION.

The heirs of a deceased wife, who inherit her real estate, are not entitled to partition thereof during the life of the tenant by the curtesy.

Equity. No. 12,959. Decided November 28, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing before General Term in the first instance of a suit for partition. *Bill dismissed.*

The facts are sufficiently stated in the opinion.

Mr. W. H. SHOLES for complainant.

Mr. CHARLES A. ELLIOT for defendant.

Mr. Justice JAMES delivered the opinion of the Court:

The question which has just been decided in *Smith vs. Smith* (*post*, p. 289) is presented in this case also. This is a suit by the alleged heirs of Margaret Byrne, formerly wife of defendant, Dennis Byrne, for partition of a certain lot in this city, and for sale because partition in kind is impracticable. The property was conveyed to Mrs. Byrne, but the husband claims that the cash payment was made out of his

means, and that since her death he paid the deferred payments. He insists, therefore, that in case partition is made, he is entitled to contribution, as to the latter, from the heirs. But he also claims that he holds the premises as tenant by the curtesy, and that the petitioners cannot therefore have partition during his estate for life. As it appears that he had issue by his wife, Margaret Byrne, and that she died intestate, we find that he now holds the premises as tenant by the curtesy, and for that reason the heirs are not entitled to have partition during his life estate.

The question whether partition could be had by the heirs during an existing life estate was elaborately examined by Mr. Justice Hagner in *Moore vs. Shannon*, 6 Mackey, 157. The court, speaking through him, there said:

"The general rule, at the passage of that statute (the statute of 1876) unquestionably was, that one in remainder or reversion could not have partition during the possession of the life tenant. . . . As this rule of the law, as it existed at the date of the act of 1876, would have applied to a case like the present, the inquiry remaining for consideration is whether that statute changed the rule. If the complainants' contention is to prevail, it must appear that the intention to effect the change was declared in express words, or is evident by necessary implication. It is plain the statute does not express that purpose in such direct terms as we would expect to find if Congress intended to change the existing law, and as has been enacted in the statutes of one or more States. And a careful examination of the language has satisfied us that it contains nothing which necessarily implies such a purpose. Construing the statute according to the obligatory rules of construction, we have arrived at the opinion that, although a tenant in common or coparcener within this District may compel partition, whether his title be legal or equitable, it is still, notwithstanding the act of 1876, indispensable to his right to institute such proceedings that he shall be actually seized or in possession of whatever estate he may claim to be entitled to."

According to this settled construction of the act of 1876, the complainants in this suit are not entitled to partition during the life of the tenant by curtesy.

As this cause is heard here in the first instance, we make the decree here. The bill is dismissed.

BENJAMIN F. JACKSON

vs.

JOHN D. MERRITT ET AL.

PRACTICE ; NON-SUIT ; APPEAL.

1. A trial court, at the request of the plaintiff made at any time before verdict, even after a motion is granted to direct a verdict for the defendant, is obliged to enter a judgment of non-suit.
2. A trial court cannot properly allow a voluntary non-suit with leave to strike it out at another day, nor has it a right to strike out a voluntary non-suit once entered.
3. The statute of 2 Henry IV., Chap. 7, is in force in this District.
4. No such thing as a compulsory non-suit is known to procedure in this jurisdiction.
5. An appeal or exception presupposes a judgment or decree ; hence, there can be no appeal from a mere opinion of the court.

At Law. No. 28,735. Decided November 28, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the defendants from an order setting aside judgment of non-suit. *Reversed.*

The facts are stated in the opinion.

Messrs. WM. A. COOK and H. O. CLAUGHTON for defendants (appellants).

Mr. LEIGH ROBINSON for plaintiff (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This is a suit at law brought by Jackson against Merritt and the executors of Marini. The amended declaration

alleged that Merritt and Marini, with other persons named, were the incorporators of the Chesapeake Fire Insurance Company of the District of Columbia, formed for the purpose of carrying on a general insurance business within the District; that the affairs of the company were managed by directors or trustees and Merritt and Marini were of the number; that at the date named the plaintiff was the owner of a house in the town of Bartow, in Florida, in which he had an insurable interest; that on the 2d of August, 1886, he obtained a policy of insurance from this insurance company for \$1,000 on the property, which in the October following, was destroyed by fire; that due proof of loss was made, but the insurance company refused to pay; that thereupon suit was brought against the company in the Circuit Court, and in February 1888, a judgment rendered against the company for the amount claimed; that subsequently execution was issued thereon, which was returned *nulla bona*; that Sec. 562 of the Revised Statutes of the District of Columbia provides that the president and a majority of the trustees of every such insurance company shall, within thirty days after the payment of the last instalment of capital stock, make a certificate stating the amount of the capital so fixed and paid in, to be signed and sworn to by the president and a majority of the trustees, and recorded in the office of the Recorder of Deeds of the District of Columbia; and by Sec. 566 every such company shall annually, within twenty days from the 1st of January, make a report, which shall be published in the newspapers of the District, stating the amount of its capital, and the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, verified by the oath of the president and secretary of the company, and filed in the office of the Recorder of Deeds of the District; and that by Sec. 567 it is provided that if any company should fail to comply with the provisions of the preceding section all the trustees of such company shall be jointly and severally liable for the debts of the company then existing, and for all that shall be contracted before such report shall be made.

The declaration then avers that no such reports were made and that these provisions were in no way complied with up to the time of this suit, and therefore the defendant Merritt, one of the original incorporators and trustees, and the defendants, Clifford and Colliere, as the representatives of Marini, a deceased trustee, are liable, and the suit is brought to recover the amount of the policy from the said defendants.

Several pleas of different descriptions were filed and passed upon, and the case finally went to trial.

The plaintiff having opened his case to the jury, adduced all his evidence then at hand, and there rested. Whereupon the defendants, the executors of Marini, and the defendant Merritt, severally moved the court to instruct the jury to return a verdict in their favor; which motions were argued, and the court took the same under advisement. The presiding justice, thereafter, on the 9th of February 1892, read an opinion, in which he examined, *seriatim*, the objections made by the defendants to the right of the plaintiff to recover, and overruled them all, except that which was based upon the alleged absence of any proof of indebtedness by the insurance company to the plaintiff, concluding with this language:

"I am, therefore, reluctantly forced to conclude on this one question of indebtedness prior to defendants' ceasing to be trustees, the plaintiff has made no proof, and that defendant's motion must be granted."

The next entry in the record is: "And thereupon the court respited the jury until the 15th day of February, A. D. 1892, and gave leave to the plaintiff to consider what they should do; to which said defendants then and there objected, and thereupon, on the said day, the trial being resumed, the plaintiff, without offering any other or further proof on his behalf, moved the court for leave to the plaintiff to have a judgment of non-suit entered in said cause, with leave reserved to said plaintiff at another day to move to have the same set aside; to which motion the defendants, by

their counsel, then and there objected; but the court granted the said leave to the party, to which leave defendants then and there excepted, and the justice noted the exception upon his minutes, and the said judgment was entered in the words and figures following, to wit:

"Now again come here the parties aforesaid, in the manner aforesaid, and the same jury that was respited on the 15th of February last; whereupon the plaintiff submits to a non-suit, with leave to move to set aside the same within ten days.

"Now, therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against said plaintiff the costs of their defence, taxed at \$—, and have execution thereof."

Thereafter, under date of the 23d of February, 1892, the record states:

"Now comes the plaintiff, Benjamin F. Jackson, by Leigh Robinson, his attorney, and moves the court to set aside the non-suit heretofore directed to be entered in the above entitled cause."

This motion was accompanied by three affidavits, designed, as we suppose, to supply the requirements of proof as to pre-existing indebtedness. The record then proceeds, "to the granting of which motion the said defendants, Merritt, Clifford and Colliere, by their counsel, then and there objected; but the court, on the 29th day of February, overruled the said objection, and granted said motion and set aside said non-suit, and entered its ruling as follows:

"'Upon hearing the plaintiff's motion to set aside the judgment of non-suit heretofore entered, it is considered that said motion be and the same is hereby granted, and that said judgment of non-suit be and the same is hereby set aside, and for nothing held'; to the granting of said motion the defendants excepted, and note an appeal to the General Term."

The question now for our decision is whether the action of the court, in the particulars recited, was proper under our rules.

On the argument here, a preliminary objection was made by the plaintiff as to the regularity and sufficiency of the exception and appeal taken by the defendants. Upon examination, we think the objection is not tenable, and that the appeal is properly here.

The first question is as to the propriety of the first of these orders, by which the court, having intimated it would be obliged to grant the defendants' motion, respited the jury, gave the plaintiff leave to consider what course he would adopt, and then entertained the plaintiff's motion to enter a non-suit upon terms with leave to move thereafter to strike it out.

It is insisted by the defendants that in the then stage of the case, the court was without authority to allow a non-suit to be entered by the plaintiff, or to enter it of its own motion; and that the defendants were entitled then to have a distinct ruling on their motion to require the jury to return a verdict for the defendants.

In our opinion, so far as the mere entering of a non-suit is concerned, the plaintiff had the right to ask for it, and the court was bound to have it entered. This is the well-settled practice. Although the quotations we may give embody familiar law, we repeat them, as the propriety of the practice was so earnestly challenged in the argument.

In Sellon's Practice, the author in his discussion of the general subject states there are two kinds of non-suit mentioned in the books: one known as voluntary, which is entered at the request of the plaintiff; and the other involuntary or compulsory, which is granted without, or against the consent of the plaintiff, on the motion of the defendant, or sometimes by the court *sua sponte*.

With respect to the voluntary non-suit, the law is thus stated in 1 Sellon, 464:

"But the plaintiff, if he pleases, may suffer a non-suit at any time before the verdict is given, though after the full discussion of the cause and the summing up of the judge in defendant's favor."

In Evans' Practice, where the whole subject is very fully examined, the author, on page 315, sums up the matter as follows:

"Whenever the plaintiff finds that the court is against him, upon the law, he has this question to settle for himself: is it better to take the chance of altering the state of facts, by new testimony on another trial, or is the court so clearly wrong that I can reverse the judgment on appeal? As he answers this question, he determines whether to suffer a non-suit, or hear the verdict; for if he suffers a non-suit, which is a voluntary act, all his bills of exceptions are gone. Where the lapse of time has, pending the suit, barred the claim by operation of the statute of limitations, he has no choice to make; present defeat in that case being final defeat."

In 34 Md., 15, *Hall vs. Schuchardt*, the matter was fully discussed in a case whose features are very much like that before us. There a trial was had before the court without a jury, under a provision of the State constitution, in an action brought against the appellants as drawers of a foreign bill of exchange: and the main question was whether sufficient proof of notice of protest had been given to bind defendants. After the argument the case was submitted, and the presiding judge thereupon delivered an oral opinion, sustaining the objections to the protest; and ruled that neither of itself, nor in connection with the other testimony was it admissible, and that the plaintiffs were not entitled to recover; but made no entry of his opinion in the case. That course, it will be observed, was precisely that pursued by Justice Montgomery in the present case.

At that point, the plaintiff's counsel in the Maryland case took an exception to the ruling and applied to the court to suspend further proceedings until they could consult with their client, who resided in New York, whether they should resort to a non-suit (with the expectation of supplying the requisite testimony at a future time), or suffer judgment to

be entered and take an appeal. To this the defendant counsel objected, insisting it was too late to enter a non-suit in a case submitted without a jury, after the court had announced its decision against the plaintiff. But the court held the plaintiffs had yet a right to enter a non-suit under the circumstances, and granted the delay asked for. Subsequently, the plaintiff's counsel gave an order to enter the non-suit, which being brought to the notice of the court, a judgment of non-suit followed.

In the course of the opinion in the appellate court, the learned judge said:

"In jury trials of civil causes, after the jury have agreed and before the verdict is taken, the plaintiff is called by the clerk, and if he fails to answer in person or by counsel, the jury are discharged and judgment of non-suit passes against him. Up to this point of time, and until the verdict is actually announced by the foreman in response to the question, 'What do you say; do you find for the plaintiff or for the defendant?', the right to a non-suit exists, but ceases after the plaintiff has answered and the foreman announces the verdict. He is called for the purpose of allowing him an opportunity to determine whether he will take a non-suit, or hear the verdict; and he must then make his election. A non-suit is in many instances of importance, because it gives the party the right to commence the same suit again, and alter its status by additional testimony; whereas if he answers and hears the verdict, he must stand on the case as then presented and rely upon his exceptions and upon obtaining a reversal of the judgment on appeal."

The court then proceeds, "In Evans' Practice, 402, it is said with entire correctness, that the expressions common in English books, saying that the judge 'directed a non-suit,' and others of similar import, mean no more than this, that the judge expressed, in that form of words, his opinion that the plaintiff was not entitled to recover, and the party submitted to a non-suit, rather than the judge should enforce his opinion by a direction to the jury as to their verdict."

In conclusion, the court affirmed the ruling of the lower court, and allowed the judgment of non-suit below to stand.

Such has been the practice in this District so long as I have been here; nor have I ever heard of a ruling here to the contrary. I recall a case, very vigorously contested in the circuit, brought on a contract to furnish material for one of the marble buildings at the Soldiers' Home, in which, after the court at the close of the plaintiff's testimony, had intimated its purpose to direct a verdict for the defendant, plaintiff moved for leave to enter a non-suit. The plaintiff's right being disputed by the defendants, the question was very carefully considered, and the presiding justice held the plaintiff's right to make the entry at that stage of the cause was undoubted.

The next question is: Had the plaintiff, after the judgment of non-suit had been entered, the right to have it stricken out?

If the non-suit is to be regarded as a voluntary one, which is the only kind known to our practice, we are of opinion the plaintiff had no such right.

In 1 Sellon, 466, referring to the case of *Hutchinson vs. Brice*, 5 Burrow, 2692, the author says:

"The court will not set aside a non-suit voluntarily suffered by plaintiff, and give him leave to reply *de novo*, so as to put the issue on another footing than he before had done."

Where, however, a non-suit is compulsory, in jurisdictions where the practice of entering involuntary non-suits is recognized, the court may, in its discretion, under circumstances, allow such non-suit to be stricken out.

In 1 Sellon, 465, the author, speaking of compulsory non-suits, says:

"Formerly it was held that a non-suit could not be set aside, though occasioned by the mistake of the judge. But in the case of *Sadler vs. Evans*, 4 Burr., 1986, the court were unanimous, both upon principle and authorities, that where a judge at *nisi prius* non-suits the plaintiff, and is mistaken, the court, upon motion, may set aside the non-suit."

Mr. Evans, in discussing the only description of non-suit known to the Maryland practice, says (page 314): "It is manifest from the definition that a non-suit must be the voluntary act of the plaintiffs." "A non-suit occurs after the jury is sworn. It is said that in England there are other varieties of non-suits, but in our phraseology the distinction just alluded to is generally observed."

It appears, then, that compulsory non-suits may be entered without reference to the plaintiff's wishes and at any stage of the proceedings, in jurisdictions where they are recognized; and may also be stricken out on motion in the discretion of the court.

It is insisted on behalf of the plaintiff that so much at least of the practice which obtains in England, and in some of our State courts, as allows a compulsory non-suit to be stricken out, applies also to a voluntary non-suit.

But in our opinion, no such thing as a compulsory non-suit is known to our procedure. We have seen that nothing of the kind ever existed in Maryland, and we have examined every source of information as to the subject in this District and have found no such practice.

In 23 Maryland, 317 (*Kettlewell vs. Peters*), a suit was brought by the administrator of the owner of a nursery to recover the price of a number of fruit trees sold by the deceased to the defendant. When the trial had proceeded to some length, the counsel for the defendant claimed a compulsory non-suit upon the ground that the administrator had no title to maintain the action. The court below overruled the motion to enter a non-suit against the will of the plaintiff; and on appeal the court disposed of the case in this way:

"The appellant moved the court to non-suit the plaintiff, on the ground that the suit ought to have been instituted in the name of the heirs-at-law of the deceased, but the court overruled the motion of the appellant, to which he excepted, and prayed this appeal. Whatever may be the mode of proceeding in other States, this is not adopted in Maryland.

. . . The motion of the defendant below, being contrary to the practice established in this State, was properly over-ruled, however sufficient the reasons might have been for defeating the action, if presented in another form, upon which we do not mean to express an opinion in this case. A non-suit must be the voluntary act of the plaintiff. Evans' Practice, 314."

No such practice prevails in the United States courts. This was first laid down by Judge Marshall, 1 Peters, 469, *Elmore vs. Grymes*, in explicit terms—"this court is of opinion that the Circuit Court had no power to order a peremptory non-suit against the will of the plaintiff."

In *Silsby vs. Foote*, 14 Howard, 222, the court seems to have finally disposed of the question in this way:

"But as it has been repeatedly decided that the courts of the United States have no power to order a peremptory non-suit, against the will of the plaintiff, it is not necessary to examine the grounds of the motion."

The Supreme Court, however, again referred to the subject in *Castle vs. Bullard*, 23 Howard, 183, where similar language was used. The decision in the first case was placed upon the ground that, by the Constitution, the plaintiff was entitled to a trial by jury, and that a compulsory non-suit would be an invasion of that right.

Nor is there any statute in force in this jurisdiction which would allow such a practice. The statute of 2 Henry IV., Ch. 7 (which, though 492 years old, is in force in this District), declares that in no action should a judgment of non-suit be granted in favor of the plaintiff, if a verdict has been passed against him. This statute, so far as it affects the point, is a legislative declaration against the policy of substituting non-suits in the place of verdicts. Mr. Alexander in commenting on it in his compilation of British statutes, cites *Kettlewell vs. Peters*, 23 Md., 312, already referred to; as showing that a voluntary non-suit is the only one known in Maryland.

The author in 1 Sellon 368, explains the origin of the

English practice of entering compulsory non-suits under the heading "E. In what cases judgment, as in case of a non-suit, is allowed" as follows:

"This proceeding is founded upon the statute of 14 George II., Ch. 17, whereby it is enacted that where any issue is or shall be joined in any action or suit at law, in any of his majesty's courts of record at Westminster, the Court of Great Sessions for the principality of Wales, &c., and the plaintiff or plaintiffs in any such action or suit has or hath neglected or shall neglect to bring such issue on to be tried according to the course of practice of said courts respectively, it shall be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in court, to give the like judgment for the defendant or defendants, in every such action or suit, as in cases of non-suit," &c.

The author's statement of the necessity for the passage of this statute shows, that after the jurisdiction had been given to the courts at *nisi prius* in the counties to hear causes unless the judges should come first from Westminster, &c., the plaintiffs sometimes to prevent trials would refuse to take down the record. To meet this device for delay, the defendant himself was authorized by rule of practice to take down the record, provided the plaintiff would not do so; and present it to the court, which would then hear the cause. This practice obtained the technical name of carrying down the record, "with a proviso," but it was slow and expensive; and to meet these difficulties this statute was passed. But it applied in terms to only a few of the courts in England, and never was in force in Maryland. (Kilty's Report on the Statutes, 125.)

In the case of *1 Peters*, 469, before cited, Mr. Justice Johnson entered a vigorous dissent. He sat in the case below, in the Circuit Court for the District of Georgia and explained in his dissent that he understood the United States courts adopt the practice of the State in which they are held; that in his district the English practice of entering compul-

sory non-suits existed, and he had therefore conformed to that practice; and upon the application made by the defendant, had ordered a non-suit, with leave to strike it out, which was finally made absolute. But the decision by Chief Justice Marshall shows the court rejected this view, after their attention had thus been distinctly called to the argument in opposition.

It thus clearly appears that this practice never was in force in Maryland, nor in this District, and does not prevail in the United States courts; it is nevertheless in force in some of the States, and Mr. Justice Johnson correctly says that the courts of Massachusetts and New York stand with the English courts, against the courts of Pennsylvania, Virginia and Maryland, where he admits the rule did not exist.

In some States it exists by statute, as is the case in the State of New York. And in Michigan, as I infer from an examination of the code of that State, the entry of judgment, "as in case of a non-suit," as the practice is there described, is wholly the creature of statute, and the decisions in that State recognize that such is its origin.

If we had the right to import this procedure into this jurisdiction against our own practice and against the practice of Maryland, and against the practice of the United States courts, we think it would be unwise to do so. There are stumbling-blocks enough now in the way of the speedy disposition of cases, without setting up a new one which would subject a party defendant who has done his best to bring his witnesses to court, perhaps at great expense and inconvenience, to the further cost and vexation which would result from the entry of non-suit; at the plaintiff's request, to be sure, but with the privilege of striking it out at the plaintiff's pleasure.

According to our present practice, the entry of a voluntary non-suit, at the instance of the plaintiff, requires him to bring an entirely new action, subject to whatever advantage the defendant may possibly receive from the dismissal of the

former suit. If the Michigan practice were engrafted upon our procedure, the plaintiff would have everything to gain by the entry, while the defendant could obtain no benefit from the lapse of time, though it might be sufficient to bar a new action; and notwithstanding the entry of the non-suit may have been wholly owing to the fault of the plaintiff.

We therefore think the learned justice below, undoubtedly imbued with this practice from the courts with which he was familiar and of which he was an ornament, and perhaps not having his attention called to the fact that it was unknown to our practice, fell into error in granting the motion; and therefore the allowance of the non-suit with leave to move to strike it out, and the further order striking it out, must both be reversed.

What, then, becomes of the case? We have heard elaborate and able arguments on both sides as to the liability of the trustees, under the proper construction of the law, and whether there was a breach of duty on their part under the circumstances of the case. But there was no decision of any of these questions by the court below, and of course no exception or appeal from any such decision, for none was made. The justice below intimated his opinion as to one of those points, but it is perfectly settled there can be no appeal from a mere opinion. An appeal or exception supposes a judgment or decree. Hence, there is no way in which we can consider the correctness of the views of the justice below, on any question except as to the orders as to the non-suit.

The defendants present no exception to the refusal of the court to instruct the jury as they requested, and nothing is before us except the point we have already decided.

We are just in the predicament in which the Court of Appeals found itself in the case of *Kettlewell vs. Peters*, 23 Md., 318, where they said:

"So, in the present instance, the motion to non-suit the plaintiff, and the reasons on which it is based, are entirely independent. According to the authorities, the motion was

untenable, notwithstanding the plaintiff might have been entitled to recover. The bill of exceptions, therefore, presents nothing but the question whether there was error in refusing the motion. That being determined, it is unnecessary and improper to examine other points which were not necessarily involved."

The proceeding below was a mis-trial. At a critical point in the case, the justice below interfered by passing orders which were irregular and without authority. The jury is gone, and nothing is before us for examination. We are obliged, therefore, in reversing these orders, *to remand the case for a trial de novo.*

JOHN W. GREEN SMITH

vs.

WILLIAM HERBERT SMITH.

ESTATES BY THE CURTESY.

1. A husband need not necessarily have had some right in his wife's estate during her life, in order to have an estate by the curtesy after her death. The fact that he has no interest in her lands during coverture is not sufficient by itself to make curtesy impossible in case she dies intestate.
2. Since the passage of the Married Woman's Act (Secs. 727-730, R. S. D. C.), the husband continues to have his common law right as to curtesy, subject to be defeated by his wife's alienation of her property. If his right is not thus defeated, it simply remains undisturbed by her, and he takes his estate.

At Law. No. 28,604. Decided November 28, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing before the General Court in the first instance.
The decision of the General Term at a prior hearing reversed.

The facts are stated in the opinion.

Mr. H. E. DAVIS for plaintiff.

The defendant appeared in person.

Mr. Justice JAMES delivered the opinion of the Court:

The facts of this case are set forth in the following stipulation:

"The plaintiff and Sallie W. McKelden intermarried in the District of Columbia on March 13, 1875. On April 10, 1876, issue of such marriage, a son, was born, and is still living. On July 23, 1879, John C. McKelden and wife, parents of the said Sallie W., duly conveyed to her in fee simple certain improved real estate situate in said District. On May 13, 1885, Charles King and another duly conveyed to said Sallie W., wife of the plaintiff, in fee simple, certain other improved real estate situate in said District. On April 19, 1886, said Sallie W., wife of the plaintiff, being then seized of the said real estate aforesaid, died intestate, leaving surviving her the plaintiff, her husband, and their above-mentioned son, her only child and heir-at-law. Since the death of the plaintiff's said wife, the defendant guardian of her said infant son, by appointment of the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, has collected and received the rents, issues and profits of the real estate above mentioned, claiming the right so to do to the exclusion of the plaintiff, surviving husband of said Sallie W. Smith, formerly McKelden, and the defendant now has in his possession, as such rents, issues and profits, the sum of four hundred and thirty-two dollars and twenty-six cents.

"And it is further stipulated and agreed that if the court shall be of the opinion that the plaintiff is tenant by the curtesy of the real estate above mentioned, judgment may be rendered by the court for the plaintiff for the said sum of four hundred and thirty-two dollars and twenty-six cents, otherwise judgment shall be for the defendant. And it is agreed that, with the consent of the court, the said cause may be ordered to be heard at a general term of the court in the first instance."

The cause was heard upon the stipulation at a former

term of this court, and it was held, in an opinion delivered by myself, that the plaintiff was not entitled to an estate by the curtesy. At a later day that judgment was set aside and a rehearing was ordered on the suggestion of the court. The question presented by the stipulation has been submitted on elaborate and learned briefs, and has been fully considered. We have now to announce our conclusions.

Of course the plaintiff would by the common law have an estate by the curtesy in the case stated to us. The question to be considered is, whether the act of 1869, known as the Married Woman's Act, has the effect to abolish that estate. Its provisions have been embodied in the following sections of the Revised Statutes:

"Sec. 727. In the District the right of a married woman to any property, real or personal, belonging to her at the time of her marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"Sec. 728. Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner, and with the like effect, as if she were unmarried.

"Sec. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"Sec. 730. Neither the husband nor his property shall be bound by any such contract made by a married woman, nor be liable for any recovery against her in any such suit, but judgment must be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It is to be observed that, while this statute protects the husband from certain liabilities, his rights are not mentioned. These are not the subject-matter of the law. They are acted upon only by the resulting operation of the pro-

visions relating to the wife's rights, and the process by which they are so affected is diminution by inconsistency with what is given to her. In this process no right belonging to the husband previous to the statute is negatived and taken away, if it can continue to exist along with a complete enjoyment by the wife of the rights and capacities given to her. We apply this mode of construction, not on any principle that the rights of husbands especially are to be favored in construing a law, but because we hold that the effect of legislation framed after this fashion is not to be determined in any other way. It is not to be supposed by the courts that the legislature intended either to diminish or extend rights which are not the direct subjects of its statute, any further than they must be diminished or extended by the perfect operation of its expressed provisions. We do not refer here to the often quoted and often untenable maxim that statutes in derogation of the common law are to be strictly construed. The principle to which we refer is far more essential to certainty of rights, and it is only by adhering to it that judges avoid the substitution of personal doctrines where the legislature has been silent. When a statute does not even mention certain rights, they are not authorized to suppose that it intended to disturb those rights any farther than they must yield to the operation of the provisions, which it made in dealing with another subject.

In this instance some of these resulting effects are plain enough. This statute necessarily extinguishes the husband's interest in the wife's property during coverture, although it does not mention that subject. But its effect upon his right of curtesy in case of her death intestate is not so readily determined. As to this question we proceed to consider first the special intent, and next the necessary operation of the act.

It is clear that the particular purpose of this statute was to secure to married women complete independence of capacity in regard to their property; and it is equally clear

that when the wife dies, whether testate or intestate, she must be said to have enjoyed every benefit which the statute intended to secure to her. In leaving her property to be disposed of by the law when she had power to dispose of it herself by devise, she will have enjoyed all the freedom of action that can belong to proprietorship. If this statute actually intended to prevent the husband's succession in such a case, it must be said to have diminished his status when it was obvious that no benefit could thereby accrue to the wife, and merely for the sake of diminishing it. While proposing to make the relation of man and wife more humane, it would introduce estrangement. There was reason enough for effacing the brutal subjection of the wife, but none for removing every vestige of community of life. We are of opinion, therefore, that it was not what might be called the conscious purpose of this act to cut off the husband's succession by the curtesy in case of the wife's death without exercising her power to direct the succession.

It has been insisted, however, that even if this result was not aimed at, the common law estate by the curtesy has nevertheless been made impossible by the provisions of this act. This proposition rests upon the conception that by the common law the surviving husband's right to that estate depended upon his having had during coverture an interest in the wife's estate; that it was derivative from, or was a mere continuation of, that antecedent right, and that to allow its existence when all antecedent right has been abolished, amounts, not to asserting the continued existence of a common law right, but to the establishment of a new kind of curtesy estate. It is necessary, therefore, to consider the actual foundation of curtesy, and especially whether it was a mere continuance of some right beginning during coverture, or was an additional right, given by the law upon the wife's death.

Littleton stated the conditions of its existence as follows: "Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised

as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the same after dieth or liveth, yet, if the wife dies, the husband shall hold the land during his life by the law of England." Lit., sec. 35, Coke 30 *a*.

The commentary on this passage gives the following as its equivalent: "Four things belong to an estate by the curtesy, viz., marriage, seisin in the wife, issue, and death of the wife." In another note the commentator explains that "here Littleton intendeth seisin in deed."

These authorities assert that it was when all of these "four things" had happened, and not before, that the law gave to the husband an estate by the curtesy; and they seem further to import that it was the seisin of the wife, and not any antecedent right of the husband, that determined what he has to hold by the curtesy.

On this point, however, there have been some embarrassing expressions by very high authority.

In *Roberts vs. Dixwell*, 3 Atk., 607, Lord Hardwicke observed: "My Lord Coke says that to make a tenancy by the curtesy, there ought to be a right inchoate in the life of the wife." The Lord Chancellor did not designate the passage to which he referred, but the context of the report shows that it must have been the same which had been cited by counsel, namely, Coke 30 *a*.

What Coke said in that passage was as follows:

"And albeit the estate be not consummate until the death of the wife, yet the estate hath such a beginning after issue born in the life of the wife as is respected in law for divers purposes. First, after issue had, he shall do homage alone, and is become tenant to the lord, and the avowry shall be made only upon the husband in the life of the wife. . . . Secondly, if after issue the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband; and the heir of the wife shall not, during his life, recover it in *sur cui in vita*; for it could not be a forfeiture, for that the estate was an estate of tenancy by the curtesy initiate, and not consummate."

The dry brevity of this statement needs explanation. "The formal delivery of the seisin or feudal possession, which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that, if a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated by wrong, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment along with the seisin actually delivered. Thus if a tenant for his own life should have made a feoffment of the lands in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seized of an estate of *fee simple* by wrong." Williams on Real Prop., 135. When the husband made feoffment in the manner described by Coke, it was immaterial whether he was seized in his own right after issue had, or was still seized in right of his wife; in either case he had seisin and was able to deliver seisin. The result was, that the whole estate in the land was gone out of both, and was, so far as he was concerned, wholly in the feoffee. Of course, there was no way in which he could recover it in order to take his curtesy.

The effect actually achieved by the peculiar operation of a feoffment seems to have led some of our courts to understand Coke to mean that the husband acquired, on the birth of issue, an actual though partial estate, which he called curtesy initiate; an estate which he had a right to convey; and this conception of an already accrued interest, by way of curtesy, has been carried so far by some courts in this country, that they hold that interest to be subject to sale on execution, so that the purchaser may hold during the life of the surviving husband. The passage of Coke, from which this conclusion was drawn, seems to import no more than that the husband actually had seisin of the wife's land, and that therefore his feoffment had the usual effect of that mode of alienation.

In this inquiry, however, it is unnecessary to consider

what the extent of the right which Coke called curtesy initiate actually was. The important point is that whatever it was it cannot be gathered from the text referred to that that right was a condition precedent to an estate by the curtesy. Coke only stated, as a fact of the common law, that on the birth of issue certain rights and capacities did accrue to the husband; he did not state that they must have existed in order that the consummate estate by the curtesy should be acquired. On the contrary, he seems to have intended that these rights and capacities were allowed by way of anticipation of the consummate estate, and only because the right to have that estate, in case the husband should survive, was then certain. Instead of suggesting that the antecedent rights of curtesy initiate were the foundation of the consummate estate, this passage suggests that they were themselves dependent upon the latter. Speaking with due respect, the contrary conclusion seems to us to have been based upon an assumption that *post hoc propter hoc*. We do not find authority for saying that the husband must have had some right during the life of the wife, in order to have an estate by the curtesy after her death. We are of opinion that the fact that he has no interest in her lands during coverture, is not sufficient by itself to make curtesy impossible in case she dies intestate.

We have next to consider the effect of the wife's power to devise her land. At the common law, when issue was had, the right of the husband to have curtesy, in case he should survive her, was absolute. The consummate estate, or more properly speaking, the estate, began at her death, but the right to have it, in case of survival, was indefeasible. The question is, whether an estate which can be enjoyed only when the wife dies intestate is something different from curtesy, and amounts to a new kind of estate, which a court cannot create or recognize. We think that, under a proper construction of our statute, the right of the husband was not taken away, but was only subject to be defeated by an exercise of the wife's power of devise. If not thus de-

feated it would proceed to take effect. As we have already said, the rights of the husband are acted upon by this statute only by the resulting operation of its provisions relating to the rights of the wife, and the process by which they are so affected is diminution by inconsistency with what is given to her. According to this construction, the husband continues to have his common law right as to curtesy, with this diminution, namely, that it is subject to be defeated by the wife's devise. If his right is not thus defeated—in other words, if the wife dies intestate—it simply remains undisturbed by her, and he takes his estate.

At the first hearing of this cause, we attributed to certain authorities a weight which we do not now concede. On re-examination of this question, we are constrained to reverse the conclusion which we then reached. It is proper to acknowledge here the aid we have received from the learned discussions of counsel.

This cause was certified to this court to be heard in the first instance, and we make the decree that the plaintiff shall recover for the four hundred and thirty-two dollars and twenty-six cents. I understand that interest was purposely left out.

ROBERT GREENWELL

vs.

THE WASHINGTON MARKET COMPANY.

CONTRIBUTORY NEGLIGENCE; POWER OF COURT TO DIRECT VERDICT.

1. The care required of one to prevent an accident is that degree of care which may reasonably be expected from one in his situation. What will be deemed reasonable care in any case will depend upon the particular circumstances of that particular case.
2. A trial court may withdraw a case from the jury, and direct a verdict, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

At Law. No. 29,556. Decided November 28, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a bill of exceptions taken by the plaintiff.
Judgment affirmed.

The facts are stated in the opinion.

Mr. J. G. BIGELOW for plaintiff (appellant).

Messrs. BIRNEY & BIRNEY for defendant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This is an action at law. The first count in the declaration is as follows:

“The plaintiff sues the defendant, a corporation duly incorporated by an act of the Congress of the United States, having its habitat and place of business in the city of Washington, in the District of Columbia; for that whereas the defendant, to wit, on or about the 9th day of February, A. D. 1889, was and still is, the owner and manager of a large market house in the said city of Washington and District of Columbia, in the upper portion of which the defendant,

at the time aforesaid, kept and maintained, and still keeps and maintains, large apartments for cold storage of meats and other merchandise vended at said market house; also at the time aforesaid, the defendant kept, maintained and managed, and still keeps, maintains and manages, certain elevators used for the purpose of hoisting and lowering said meats and other merchandise in connection therewith.

"And certain servants and agents of the defendant had the management and care of, and were operating by hydraulic pressure, one of said elevators, at the time aforesaid; yet the defendant not minding or regarding its duty in this behalf, took so little and so bad care in the operation of the said elevator, that by and through the gross negligence, carelessness and mismanagement of the defendant and its said servants and agents, and for want of due diligence and proper care of the defendant and its said servants and agents, left open, unguarded, unprotected and with no light burning to disclose the dangerous pitfall beneath, the doorway leading into said elevator on the ground floor. And, in the darkness of the night, the plaintiff innocently mistaking the said doorway as conducting into one of the defendant's water-closets, fell headlong into and down the said dangerous pitfall, a distance of about four feet, upon the iron shaft, piston and machinery used by the defendant and its said servants and agents in operating said elevator; and the plaintiff became thereby and was greatly injured, bruised, hurt," &c.

The second count in the declaration is precisely the same as the first, except that there is an allegation of special damage.

General issue was pleaded to this declaration, issue joined and trial had. The plaintiff offered evidence to sustain the declaration and his cause of action. At the conclusion of his evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was sustained by the court, and judgment was entered for defendant.

To this action of the court an exception was taken, and a

bill of exceptions prepared and signed by the justice presiding. I read from the bill of exceptions:

"The plaintiff, to maintain the issue on his part joined, offered evidence tending to show that on the west side of the Seventh street wing of the market building, in the court or yard of the defendant, outside said market building, there was, and is, a sidewalk from ten to twelve feet wide, leading to double folding-doors opening into the main or central portion of the market house; that at the angle formed by the intersection of the west wall of the Seventh street wing and the north wall of the main or central portion of the market house the defendant then had, and was operating an elevator; that the walls of the shaft or well-hole of the elevator were formed on the east by the west wall of the Seventh street wing, on the south by the north wall of the central or main portion of the building, and on the north by a brick wall projected from the west wall of the Seventh street wing, and on the west by a wall connecting this wall with the north wall of the main or central building, with an opening four or five feet wide as a door leading into the elevator shaft; that the walls as thus constructed of the elevator shaft extended about half-way across the sidewalk on the west side of the Seventh street wing; that the car of the elevator was operated by hydraulic pressure, and ran up and down flush with the walls of the elevator shaft or well-hole; that said well-hole or shaft was about four feet deep below the pavement, and in the center thereof was the iron piston used in operating the car of the elevator; that this shaft-hole was in close proximity to the folding-doors mentioned, and the outer edge of it was distant from the sidewalk by the thickness only of the wall of the elevator shaft; that four bolts, at the bottom of the shaft, projected about three inches each above the nut that comes on the top of the cylinder, and that this elevator was used by the defendant in connection with its cold storage overhead, and was outside its market building.

"And the plaintiff, being sworn, testified in his own be-

half, that he is fifty-four years of age, by trade a blacksmith, and employed in the navy yard; that on the 9th of February, 1889, he had been to Mr. Redman's store, on Ninth street northwest, to pay a bill; that on his way back he came through the market house, and went over to Mr. Johansen's restaurant, and met there Mr. Belt, Jr., and Mr. Indamauer; that then they—all three—went over to the market house, and while standing there talking, Mr. Belt, Sr., came up; that in the meantime he asked Mr. Indamauer where the water-closet was; that the latter, pointing the way, told him to go out that door; that he went out there into the courtyard, stood awhile, he thought about two minutes; but it was very dark, and the first place that looked to him like a water-closet was a dark opening, and he walked right into it; that he made a grab at something when he found that he was going, and that he must have turned over and cut his head and struck his left knee against something in the bottom of this pit; that he had no idea how deep the pit was; that he had not seen it since, and was never there before; that he believed he was knocked senseless, and did not exactly remember how he got out. When he found himself he was outside, though coming into the door; that when he came out of the pit the elevator was up, and he did not know what prevented it from coming down on him; that he is not conscious that he made any outcry; that from there he went right into the market where these gentlemen were standing; that they took him across the street and had his head washed, and from there Mr. Indamauer took him to Gilman's drug store, and his head was dressed; that he and Mr. Indamauer thence returned to Johansen's restaurant, and from there they went over to the market house office, upstairs, to see about the matter, but the Governor was not there; and in answer to questions by his attorney, the plaintiff further testified that there was no light at the elevator, and he stepped right into the hole; that there was no light at all there or anywhere in the yard; that the result of his injury was that he got hurt very bad; that he got his knee

mashed up, and a cut two and a half inches long on his head; that he was laid up for fifteen days, and was attended by Dr. Adams, now deceased, who visited him eleven times; that his bill was \$25, and he was put to other expenses for medicines; that he receives a *per diem* salary of \$3.04; that his main injury was to his knee, but that it did not seem to bother him so much as the head injury until the next morning, when he could not lift it out of bed at all, it was so swollen; that he then sent for the doctor, who attended him for fifteen days, and that the doctor said it was a terrible wrench or sprain of the knee; that he still feels the effects of this injury all the time, and particularly in cloudy weather. And on cross-examination the plaintiff testified that for two weeks after he returned to his work in the Navy Yard he was allowed to sit down, and that he did not for this time do any hammering; that at the time of the injury about eight o'clock in the evening, the market inside was brightly lighted, and there were many persons in there doing their marketing; that he himself was not in there for the purpose of buying anything or attending to any business. He was there only with his friends; that when he inquired for the water-closet, Indamauer said, "Go right out that door; there you will find it"; that he had no other guide for his direction; that he was never there before; that the yard was very dark, and no other person was out there as far as he saw; that he saw the dark opening, looking like a doorway, and as it looked more like the entrance to a water-closet than anything else he saw, he walked into it; that he had taken a drink of whiskey at Redman's about six o'clock of that evening, and, a short time before the accident, he had taken another drink of whiskey at Johansen's restaurant, and that that was all he had drank that day, and that he was perfectly sober.

"Other evidence was adduced by the plaintiff tending to show that the cross-bar that the defendant had theretofore used to prevent accidents at the elevator was broken, and that there was at the time of the accident no light nor any barrier in front of the opening to the elevator shaft.

"The above is all the evidence that is material to the plaintiff's right to recover of the defendant for the alleged injury. And thereupon the plaintiff rested."

It is claimed by counsel for the plaintiff that this evidence was sufficient not only to show that the defendant was negligent, but that the plaintiff was not guilty of contributory negligence; that is to say, that there was no showing of contributory negligence; and inasmuch as the law of this jurisdiction is that the burden of showing contributory negligence is on the defendant, therefore the court was not authorized to sustain the motion of the defendant to direct a verdict for the defendant.

Counsel for the defendant base their support of the judgment obtained in the court below upon two propositions: first, the plaintiff's own testimony proved him guilty of contributory negligence; second, neither the declaration nor the proof showed the violation by the defendant of any duty to the plaintiff.

Quite a number of authorities are cited by counsel for the defendant in support of their second proposition, which I will first notice. The authorities cited are in effect that the party who goes uninvited onto the premises of another, and without having any business to transact with the owner or occupant of the premises, is to be regarded either as a trespasser, or as a mere licensee; and in either case the owner of the property owes no duty whatever to such a party; that the party who is a trespasser or who is a mere licensee takes the risk upon himself of going upon the premises of another, and the owner would only be liable in case of some willful injury, such as secretly depositing spring guns where they could not be seen, in a place likely to be traveled over by a stranger, who might be a trespasser, or pitfalls similarly concealed. In such a case as that, it is conceded that the owner of the premises would be liable, because there the injury is willful. The purpose and object of the owner of the premises in creating these dangerous places, or depositing dangerous weapons, liable to

be discharged by a person stepping on them, is willful and wicked. We are of the opinion that it is not necessary for us to base the decision of this case upon the doctrine of the second proposition made by the defendant. The cases are apparently not all uniform. A great deal of discrimination has been made by the different courts, depending, perhaps, after all, more upon the variation and difference between the particular circumstances under which the accident happened, and the injury was received, than upon any real difference in principle.

A case of this character ought, if it can be, to be determined more upon its substantial merits and upon the well known and well established principles of law. Nothing is better established than that the party who is himself guilty of negligence which contributes directly to the injury which he receives, and is not the remote but the proximate cause of the injury, cannot recover from a party who may also be guilty of negligence which is also the proximate cause of the injury. It is said by counsel for the plaintiff that this is not a case of contributory negligence. I do not recall any special explanation that was given by counsel for that proposition; but the case of *Isbell vs. The N. Y. & N. H. R. R. Co.*, 27 Conn., 393, is cited by counsel, and it is insisted it is a case full of instruction upon all the points of this case, and the court were especially solicited to examine it. We find it to be a case; however, that is not applicable really to the present case. The circumstances are entirely different. It was a case where the plaintiff sought to recover damages for injury by a railroad train to animals belonging to the plaintiff that had strayed upon the track; and the question arose there in regard to the liability of a railroad company in such a case, where the owner of the animals claimed to have enclosed and confined them in an enclosure, and they had escaped from the enclosure and entered the highway, and thereafter strayed upon the track, and the train, coming along, injured them. It was quite early held, sometime before the decision in this case, that

in such a case as that it must be ascertained that the negligence of the owner of the animals was the proximate cause, and that the injury must have been the direct result of the negligence of the owner of the animals. Where the negligence of the plaintiff was only the remote cause of the injury, such, for instance, as confining them within an enclosure without a sufficient or lawful fence around the enclosure, that was held to be such a remote cause that if the animals escaped from the enclosure and strayed upon the railroad track, then the railroad company would be liable for damages for injury resulting, if it appeared in the evidence that the train, by the exercise of due diligence, might have been stopped, so as to prevent the injury, and that is true, notwithstanding the plaintiff may have had his cattle in an enclosure with an insufficient fence.

That is the substance of this case. The case is a very learned one, and very satisfactory upon that subject; but it does not reflect upon the present case.

The question of contributory negligence, we think, arises in this case beyond all question; and it is undoubtedly true, we think, that the evidence introduced by the plaintiff shows, upon a careful consideration of it, that he was himself guilty of negligence, and that even if it be conceded the defendant itself was also guilty of negligence, the plaintiff cannot recover.

The plaintiff was bound to exercise care and prudence in going into this place. The care required of one under such circumstances has been very well expressed by the court in the case of *Beers vs. Housatonic R. R. Co.*, 19 Conn., 566, as follows:

"The care required of the plaintiff is that degree of care which may reasonably be expected from one in his situation. What will be deemed reasonable care in any case will depend on the particular circumstances of that particular case."

Of course the reasonable care that is to be exercised here is such reasonable care as a prudent person should exercise

under the same circumstances; not the care which might be exercised by a careless person, but by a prudent person.

The plaintiff, in the evidence given by himself in this case, states that he had never been in this place before; that is, in this court-yard, I understand him to mean. He probably had been in the market house. He says that when he went out he stopped for a minute or two, he thinks, for the purpose of looking around; that it was very dark; that there was a sidewalk there. I may say here that whether this was a sidewalk that belonged simply to the market house company for the use of their employees, or whether it was one that was used by the public at any time in the day-time or at night, does not appear from this evidence. Counsel, in their argument, say that people were at times at least in the habit of passing and repassing along this sidewalk to go into the central market; but that does not appear in the evidence. It only appears that there was a pavement of about a certain width, which the witness called a sidewalk. He says that he saw no person about there that night; that there were no lights there anywhere; that it was very dark; that he looked about and he saw a place that looked to him more like a water-closet or the opening for a water-closet than any other place that he saw around, and assuming that it was the water-closet, he walks to it and walks right into it without stopping to make any investigation, as he might have made, even if it was dark. He had the sense of feeling left to him, and if it was difficult to tell by sight what it was, he could have determined what this opening was, whether it was a pit, as it turned out to be, or whether it was a place such as he was desirous of going into; but he did not do that.

It seems to us that the plaintiff ought to have been admonished by a number of circumstances there to exercise caution in regard to the place that he went into. First, he had no specific direction, as he says. The only direction was to pass out of the market house through a door. Beyond that he had no direction where to go or a description

of the place into which he was to go. After that, when he gets into the court-yard, he finds that it is very dark; that he is in a place he never was in before, and that he knows nothing about it. He says, too, that it is a place that, whatever use was made of it at any time, was not being used by anybody at that time, for there was no light in there.

Next, he says he saw a small opening into some place that was dark, and we think he should have been put upon his caution by all these circumstances, not to have rushed heedlessly and thoughtlessly into a place of that character without some examination himself or without making some further inquiry in regard to the place he was desirous of visiting. There was no evidence in the case that there were any water-closets connected with this market, and no evidence that there was any water-closet in the vicinity of this place where the plaintiff fell. He was not directed to go there by any person connected with the defendant or by any employee or servant of the market house company.

It seems to us that the plaintiff was guilty of gross carelessness according to his own statement, in going into this place where he did. It is an exceedingly unfortunate thing for him, but it would seem to be principally, at least, his own carelessness. He should not have gone or attempted to go in any place there under the circumstances which he states in his evidence. No prudent person would do so. It may be—indeed, for the purpose of passing upon this question we assume—that the defendant was also guilty of carelessness. In reference to the plaintiff himself, as to whether he was a mere licensee or whether he had a right to go into the market house as a public place, and had a right to presume that the defendant would exercise the proper care as to protecting persons who might go there from falling into places of this character—assuming all that, yet under the particular circumstances that the plaintiff in his own testimony develops, we think that it shows conclusively that he was guilty of gross negligence, but for which he would not have received this injury, or at least that it directly con-

tributed to his receiving the injury. That being true, it is entirely proper that the court should instruct the jury to return a verdict for the defendant, and it is proper that we should sustain the motion to permit a verdict to be entered for the defendant.

There is abundant authority for that in the decisions of the Supreme Court of the United States, cited by counsel for plaintiff in their brief. Mr. Justice Harlan, in a recent case, says:

“Undoubtedly, questions of negligence in actions like the present one are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.” Citing *Phoenix Ins. Co. vs. Doster*, 106 U. S., 30; *Griggs vs. Houston*, 104 U. S., 553; *Randall vs. B. & O. R. R. Co.*, 109 U. S., 478, 482; *Anderson County Commissioners vs. Beal*, 113 U. S., 227, 241; *Schofield vs. Chicago & St. Paul R. W. Co.*, 114 U. S., 615, 618.

“‘It would be an idle proceeding,’ this court said, in *North Penn. R. R. Co. vs. Commercial Bank*, 123 U. S., 727, 733, ‘to submit the evidence to the jury when they should justly find only one way.’” *Del., Lack. & West R. R. vs. Converse*, 139 U. S., 472.

The judgment of the Circuit Court will be affirmed.

THE UNITED STATES

vs.

ROBERT A. PHILLIPS.

PAYMENT; MISTAKE OF FACT; LIABILITY TO REFUND.

1. When an army officer has received his salary for a certain period, and subsequently assigns his pay to another for the same period, and the assignee receives from a different paymaster the salary thus assigned to him, such paymaster being ignorant of the former payment, the assignee may be compelled to refund the amount received by him, as having been paid under a mistake of fact.
2. When such a payment has been made by check on the United States Treasury, the loss is not that of the paymaster, but of the government, and the United States may, in its own name, maintain an action to recover the sum improperly paid, notwithstanding it has allowed the paymaster credit for the wrongful payment.

At Law. No. 27,854. Decided November 28, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a bill of exceptions taken by the plaintiff.
Judgment reversed.

The facts are sufficiently stated in the opinion.

Mr. A. S. WORTHINGTON for plaintiff (appellant).

Mr. L. E. PHILLIPS for defendant (appellee).

Mr. Justice JAMES delivered the opinion of the Court:

This is an action for money had and received on the following state of facts:

It is claimed that one Lieutenant Shaw, of the United States Army, drew his pay for the months of December, 1886, and January, 1887, from Major Stanton, Paymaster at Salt Lake City, Utah; that afterwards, when he came to Washington, he assigned his pay to this defendant, Phillips, for the same months, and that Phillips drew that pay from Major Tucker, here, who was ignorant that it had already

been paid to Shaw. There seems to be no dispute as to the payment to the defendant Phillips, nor as to the fact, that Shaw had assigned to Phillips; but there is a dispute as to whether the payment to Jones & Company, bankers in Utah, was a payment to Shaw. In other words, it is claimed that the assignment by Shaw to Jones & Company, of Salt Lake City, was not proven.

The court instructed the jury that there was no proof of that fact. He meant, of course, that there was no proof tending to establish that fact, which was proper evidence to go to the jury. Major Stanton's deposition contains this answer, on cross-examination:

"He (Shaw) usually drew his pay from me in person, and occasionally through his assignees, to whom I paid his salary always by check, and I think he always had this same assignee, Messrs. T. R. Jones & Co."

That is a distinct assertion that T. R. Jones & Company were Shaw's assignees, in this instance. It was not met by any contradiction, nor was any question asked about it on cross-examination. That of itself would be evidence tending to prove that Jones & Company were in fact the assignees; in other words, that Shaw had made the assignment in this case to them. We consider that evidence tending to the fact all the more, because we must know that the officer had to sign his pay account. It is one of those things known to us as a matter of the public history of the country, and as the method in which a pay account is always drawn—that the officer must always sign.

This testimony is that Shaw has frequently drawn his pay from Stanton in person. On such occasions Shaw would have to sign for his pay, so that Major Stanton was obliged to have seen him do it, and be familiar with his signature. That must be taken into consideration along with the fact that he says that Jones & Company were the assignees of Shaw. Then he testifies distinctly that he had paid these two months' accounts to Jones & Company.

That evidence should have been submitted to the jury. The court refused an instruction which it would have been

proper to give, had it not been for the opinion of the court that there was no evidence as to the payment to Jones & Company. The first prayer, we think, should have been given:

"If the jury believe from the evidence that at the time the payments were made by Major Tucker, Paymaster, U. S. Army, in behalf of the United States, to the defendant, as the assignee of Lieutenant Shaw, of the amount of Lieutenant Shaw's pay accounts for December, 1886, and January, 1887, the United States had already paid to said Shaw, or his legal assignees, the amounts of said Shaw's pay accounts for said months in full, the plaintiffs have a right to recover in the present action, and suing in their own name, the moneys so paid to the defendant as being moneys paid under a mistake of fact, and the fact (if the jury believe from the evidence that it be a fact), that the United States, through their accounting officers, have allowed Paymaster Tucker credit for such payments to the defendant does not relieve defendant from his liability to repay to the United States the moneys so paid to him."

That reminds me of another point that was made in the argument in this court. It was claimed that when Major Tucker made this second payment of Shaw's account, it was his loss, and that the United States had no action. It appears, however, that Major Tucker paid this account by a check on the Treasury of the United States, and the very moneys of the United States were paid out to the assignee Phillips. It was not Major Tucker's money, not having been placed in his hands, nor could it possibly be, in law, regarded as moneys mingled with his private money, so that Phillips would become his debtor. Had he even drawn the money and paid it, it would still, from his own testimony, be traceable as the moneys of the United States; but the fact is clearer than that. Major Tucker drew on the Treasury of the United States, and the very moneys of the United States were paid out by mistake to this defendant.

The judgment will be reversed, and the cause is remanded for a new trial.

JOHN R. DALE

vs.

ALMARIN C. RICHARDS.

TENDER; SET-OFF; CONTINGENT FEES; ATTORNEY AND CLIENT.

1. An attorney who collects money for his client, and is not guilty of laches or default in regard to paying it over, is not liable for interest. He is only liable for interest in the event that he should fail to pay the money when demanded, or should appropriate it in some way to his own use.
2. Where one person tenders to another the amount he conceives to be due, by check, and the latter does not object to the tender as not being in proper form, but returns the check on the ground that the amount thereof is too small, any objection as to the form of the tender is waived.
3. Under Section 810, R. S. D. C., an attorney may set off his fees for services, where suit is brought against him for money collected.
4. An agreement with an attorney to prosecute on a contingent fee an action on a promissory note is not unlawful.

At Law. No. 30,515. Decided November 30, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on case stated and bill of exceptions taken by the plaintiff. *Judgment affirmed.*

The facts are stated in the opinion.

Messrs. B. F. LEIGHTON and GEO. FRANCIS WILLIAMS for plaintiff (appellant).

Messrs. J. HOLDSWORTH GORDON and W. L. COLE for defendant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This was an action by the plaintiff to recover of the defendant money which he alleged the defendant as his attorney had collected upon a claim which he had placed in his hands for suit and judgment, and which he avers in his declaration, had been paid over to the plaintiff. The defendant pleaded to the declaration, first, *nil debet*; second *non*

assumpsit; third, a set-off of \$550, alleged to be due him for professional services rendered to plaintiff; fourth, a tender of \$1,902 as a portion of the sum demanded in the declaration.

Issue was joined upon these pleas, and trial had.

A case is stated and a bill of exceptions taken.

The only question made by counsel for the plaintiff, in argument, is in reference to the rejection of certain prayers which the plaintiff asked the court to give to the jury, and to the charge of the court as given to the jury. It, however, becomes necessary, in order to understand the force of the exceptions and the refusal of the court to grant the prayers asked by the plaintiff, and also to understand the charge of the court, that some statement of the evidence given before the jury should be made.

It appears that the plaintiff himself testified on the trial, in his own behalf, that he placed a claim in the hands of defendant for collection; that no special agreement was made between the parties as to the fee. There was nothing said about it being a contingent fee. A judgment was obtained, and the plaintiff gave no instructions to the defendant to institute an equity proceeding in aid of execution upon the judgment. He did not expect him to institute such proceeding. He admits that after the judgment, and after the money was received by the defendant from the plaintiff's debtor, he received from the defendant a check for the sum of \$2,224.27, which, he says, contained upon its face a receipt or memorandum in settlement of said judgment, and that he declined to receive the same, and returned it to the defendant with a note to the defendant, stating that the defendant had charged too much for his services. The plaintiff says he expected to pay the defendant what his services were reasonably worth, whether successful or not.

He then offered in evidence the record in the case of *Dale vs. Collins*, at Law, No. 26,902.

The plaintiff then called the defendant as a witness in his own behalf, who testified that the full amount of the judg-

ment rendered in the case of Dale *vs.* Collins, was paid to him on or before the 7th day of April, 1887.

The plaintiff then rested.

Thereupon the defendant was sworn, and testified in his own behalf that he understood from the fact that he had prior to that time, rendered services to the plaintiff upon a contingent fee, by agreement, and from the further fact that the plaintiff paid him nothing at the time the notes were put into his hands, or during the subsequent litigation, and from general conversation with the plaintiff, that the fee was to be contingent upon the recovery of the money; that the case was a difficult one, involving two quite intricate problems of law; that he desired help in the matter, and with the consent of the plaintiff, employed Cole & Cole to assist him. There were two demurrers in the case, and both of them were argued. Several days were spent in court upon the hearing of the case, which was strongly contested by the defendant, Collins. The defendant testified that it was necessary for the interests of the plaintiff that judgment should be obtained as speedily as possible, because one of the defendants, the maker of the note, was insolvent, and the only property of the other defendant, the indorser, was a piece of real estate upon which there was a deed of trust which was about to be foreclosed. After the judgment was recovered, the land records of the District of Columbia were examined, and a suit in equity was instituted by the defendant for the plaintiff, to charge the equity of the judgment debtor, William R. Collins, in his real estate, with the payment of this judgment. The proceedings in the case in equity were offered in evidence by the defendant.

He says that after he had collected the amount of the judgment, he informed the plaintiff, and intimated to him that the fee for his services would be \$500. The plaintiff objected to that amount, and after one or two other interviews between the plaintiff and the defendant, the plaintiff suggested that the proceeds of the judgment be deposited by defendant in bank, and a check for the amount due there-

from to the plaintiff be forwarded to him. The defendant thereupon deposited the money in the National Bank of Washington in his own name, not as trustee or attorney. The fund was not kept separate, but was included in his own account, and he checked against it.

The defendant says that he concluded, rather than to have any further difficulty with the plaintiff, to deduct only \$250, which he intended to pay to Cole & Cole as their half of the fee, and trust to getting the balance of his fee from the plaintiff at some future time, as he had an unsettled account with him for services rendered in another case. The defendant thereupon drew his check on the National Bank of Washington to the order of the plaintiff for the sum of \$2,224.27, being the proceeds of said judgment, less \$250, and delivered the same to the plaintiff, accompanied by a letter.

He testifies that \$500, in view of the services rendered, was a fair, reasonable and moderate fee. The check for the amount sent to the plaintiff was returned to him by the plaintiff. The note and check are as follows:

Washington, D. C., April 16, 1887.

John R. Dale, Esq.

Dear Sir: Enclosed please find my check for \$2,224.27, in Collins' case, with a statement of amount collected and fee deducted. As you do not call for it, I have put it in hands of a friend to hand to you.

(Signed)

Yours truly,

A. C. RICHARDS.

(No. 354.)

Washington, D. C., April 14th, 1887.

The National Bank of Washington,
of Washington, D. C.

Pay to John R. Dale, or order, two thousand two hundred and twenty-four and $\frac{27}{100}$ dollars.

\$2,224.27.

(Signed)

A. C. RICHARDS.

The defendant further testified that the money was kept by him and no use thereof was made; that it was of no use

or advantage to him, but was a disadvantage; that he always had the amount in bank to his credit until after this suit was brought, and after that time it may have been reduced below the amount, but he held himself in readiness to pay the full amount due, and could have done so at any time upon an hour's notice; that he had, subsequently to the time he deposited the money in the National Bank of Washington, the exact date he could not state, but about the time the suit was brought, transferred his account from said bank to the Columbia National Bank; that the \$50 charged in his bill of set-off against the plaintiff was for services rendered by him for the plaintiff in a suit against Joseph Anderson, Law, No. 25,314, in the Supreme Court of the District of Columbia; that he took the case against Anderson for the plaintiff on a contingent fee, and obtained a judgment and had made preparations to bring a suit in equity to enforce payment, but was prevented from doing so by the disagreement between him and the plaintiff in the Collins case; that the services rendered by him in the Anderson case were worth \$50.

The defendant to further maintain the issue on his part joined, called C. C. Cole, as a witness on his behalf, who testified that at the request of the defendant in this cause, he assisted him at the trial of the case of Dale against Collins, No. 26,902, at Law; that he had several interviews with Dale in relation to the preparation of the case for trial; that the case presented two interesting questions of law which required considerable preparation. He spent from ten to fifteen days in court, in attendance upon said cause. After the judgment was obtained, it became necessary to file a bill in equity in order to create a lien upon the defendant, Collins', property, as it was encumbered by a deed of trust; that the fee of \$500 charged in said case was just and reasonable if the fee was contingent. If there had been a retainer in the case, and the fee not contingent, \$300 or \$350 would have been a reasonable fee for obtaining the judgment. He further testified that the sum of \$50 was a reasonable fee in the case of Dale *vs.* Anderson.

And thereupon the defendant rested.

The foregoing was all the evidence given to the jury in the case. The plaintiff, thereupon, by his counsel, prayed the court to instruct the jury as follows:

"No. 1. The jury are instructed, as matter of law, that defendant has made no legal tender in this case, and that the plaintiff is entitled to recover of the defendant the amount of money collected and paid to said defendant, in the case of Dale *vs.* Collins, No. 26,902, at Law, and interest thereon until paid, from the date said money was paid to the defendant, less such reasonable sum as may be due to him for legal services rendered to plaintiff in said cause; and less, also, such reasonable fee as is due and owing to the defendant, for legal services rendered in the case of Dale *vs.* Anderson, unless they shall find said last named case was taken on a contingent fee, in which event it is not to be considered in making up the verdict.

"No. 2. The jury are instructed that if they find the fact to be that the defendant mingled the money collected and paid to him, as the proceeds of the judgment in the case of Dale *vs.* Collins, with his own money and deposited it with his own money in bank, checking against it, and using it as his own, pending this litigation, then they are advised that no tender theretofore made by him would be of any avail in discharge of plaintiff's claim for interest and costs, and the plaintiff would be entitled to a verdict for the proceeds of the said judgment, in the case of Dale *vs.* Collins, together with six per cent. interest thereon, from the date of such payment to defendant, less such reasonable fee as may be due to him from the plaintiff in said cause, and less, also, such other reasonable sum as may be due to defendant for services rendered to the plaintiff in the case of Dale *vs.* Anderson, unless they shall find that said last named case was taken on a contingent fee, in which event it is not to be considered in making up the verdict.

"No. 3. It appearing from the evidence that the defendant's plea of set-off is for an unascertained amount, not estab-

lished by express agreement between the parties, it is not a debt within the meaning of the law of set-off, and cannot be considered by the jury in making up their verdict."

The court refused to give any of these instructions, and an exception was taken to each refusal, and made a part of the bill of exceptions. The court, thereupon, of its own motion, instructed the jury, among other things, "That if they found from the evidence that the sum of \$250 was a legal and just fee for the legal services performed by the defendant for the plaintiff in the case of *Dale vs. Collins*, they were to find for the plaintiff in the sum of \$2,474-27, less such reasonable fee as they found to be due from plaintiff to defendant for professional services rendered in said cause, not to exceed the sum of \$500, and less, also, such reasonable fee, if any, as they may find to be due from the plaintiff to the defendant for services rendered in the case of *John R. Dale vs. Joseph Anderson*, No. 25,314, at Law, not exceeding the sum of \$50, with interest on such balance from the time of commencing this suit. If, however, they should find the facts to be that the said sum of \$250 was in excess of what was a just and reasonable fee in the case of *Dale vs. Collins*, then in that event they should allow interest on the balance so found to be due from the time the amount of the judgment in the said case of *Dale vs. Collins* was paid to the defendant."

The plaintiff excepted to this instruction by the court.

It is well to understand what were the real points at issue between the parties upon the pleadings and evidence. It would seem the claim of the plaintiff was that the defendant would be liable not only for the full amount of the money which he collected, but also for the interest upon it from the date that it was paid to the defendant and for costs. In view of this it is contended by the counsel for the plaintiff that the plea of tender is not sufficiently established by the evidence, and in that view, the court was requested by the plaintiff to give the two first instructions before stated. It is insisted that the evidence does not sustain the plea of tender

because it appears that the money was not deposited or kept ready for the plaintiff to accept at any moment he might see proper to do so, and that it was not brought into court for the use of the plaintiff, when the plea of tender was filed.

It is further claimed that this money having been tendered, under no circumstances could the defendant claim that the judgment or verdict should be less than for the amount tendered by him.

We think counsel for the plaintiff are mistaken in the view which they suggest of the facts and evidence in relation to the offer of payment of the money. The effect of a tender, ordinarily, if it is a perfect tender, after interest has begun to run, is to prevent interest from running after the date of the tender, and also to prevent the plaintiff, if he shall thereafter commence suit, from recovering costs. But in this case, obviously, interest had not commenced to run at the time of tendering the check. An attorney who collects money for his client, and is not guilty of laches or default in regard to paying it over to his client, is not liable for interest. He is only liable for interest in the event he should fail to pay the money when demanded, or in the event that he shall appropriate the money in some way to his own use. If, therefore, the defendant was not in default with regard to the payment of this money, he is not liable to pay interest. The plea of the tender and the proof of the delivery of the check to the plaintiff, is offered by the defendant for the purpose of showing that the defendant has always been willing to pay to the plaintiff the full amount of money which he believed he was entitled to, and that he offered to pay him a certain sum, which, he says, was more than the plaintiff was entitled to, which the plaintiff refused to receive.

If the plaintiff was entitled to receive no more than was thus offered by the defendant, and if he had withheld no more than would be a fair compensation for his services in this case, it is very clear that the defendant discharged his whole duty when he sent his check for the money to the plaintiff. It is true, it was not in a form in which a strictly

legal tender should be made; but the plaintiff did not object to it on that ground. He sent the check back, stating that he thought the defendant had withheld too much for his fee in the case. We think it was fairly submitted to the jury to find whether the amount retained was a just fee, and if it was, and if the amount included in the check was all that the plaintiff in any event was entitled to receive from the defendant out of this money, then the defendant is certainly not liable for interest from the date that he received the money, and not at all unless something thereafter occurred which would render him liable.

It appears that up to the bringing of suit, the defendant always kept the money intact, at least an amount equal to the amount of money which he was under obligations to pay to the plaintiff, and which he had collected for the plaintiff. He was ready to pay him at any moment, and this was the condition of things when this action was commenced. The defendant concedes that after suit was commenced he may have reduced his bank account below the amount which he was under obligations to pay to the plaintiff, although he says that he was always ready to pay it within an hour's notice.

The justice presiding properly instructed the jury in his charge that if the jury found that \$250 was a reasonable fee to be retained out of the money collected by defendant and that the remainder of the amount of money collected by the defendant was offered by check to the plaintiff, in that event they should return a verdict for the plaintiff for the amount so offered, with interest from the date of the commencement of the suit. If they should find that \$250 was an excessive fee, then they should return a verdict for the plaintiff for the whole amount collected, less the amount which they might determine to be a reasonable fee for the defendant, with interest on the balance from the date of the receipt of the money by the defendant; and in the event they should find that \$250 was not as much as the defendant was entitled to charge as a fee, they might deduct from the

sum of \$2,224.27, which the defendant had offered to the plaintiff, such an amount as they thought, added to the \$250, would make a reasonable fee for the defendant, not exceeding \$500, and that they should also, in any event, deduct a reasonable fee to the defendant for his services in Dale vs. Anderson, not exceeding \$50, and return a verdict for the balance so found with interest from the commencement of the suit.

Evidently the Justice below adopted the principle before stated, that the defendant was not liable for interest if he was not in default, in not paying the money to the plaintiff, and he so stated the case to the jury as that their finding should be based upon that principle.

We do not discover any error in this charge.

The remaining question is whether the defendant could set up his fees by way of set-off. It is claimed that not being for a sum of money certain, and not being technically considered a debt, it was not the proper subject matter of a set-off. Section 810 of the Revised Statutes relating to the District of Columbia provides that "Mutual debts between the parties to an action may be set off against each other by plea in bar, whether the said debt be of the same or a different nature." This is substantially the English statute of set-off. Mr. Chitty, in his work on Contracts, page 948, says in relation to this section of the statute:

"The statutes do not apply except in the case of mutual debts; that is, to claims in the nature of a debt, which are either reduced or reducible to a certain amount, and which would be recoverable in an action *ex contractu*; and therefore there cannot be a set-off against any claim in respect of which the plaintiff seeks to recover unliquidated damages; that is, damages which cannot be ascertained by the parties without the intervention of a jury." Further along, Mr. Chitty states the rule of law to be substantially as claimed by counsel for the plaintiff in his brief. The plaintiff's counsel, after claiming that the question as to the amount of these fees in the two cases was such as required a submission to the jury, says:

"The books lay down the law to be that, in actions *ex contractu*, the amount claimed by a plea of set-off, when, as in this case, not fixed by agreement between the parties, must be either capable of being ascertained by the court by mere computation, or the parties or the law must have fixed some criterion, by which, when the facts have been proved, the amount of the debt set off can be ascertained without the intervention of the jury."

It is not that the amount must be agreed upon absolutely, nor is it that it must be capable of ascertainment by a mere computation by the court; but it may be one of those matters where the parties or the law have fixed some rule or criterion by which, when the facts have been proved, the amount is ascertainable without submitting it to the jury. We think that counsel for the plaintiff has stated the rule correctly in his brief, the authorities cited by him being, in part, those cited by counsel for the defendant, and they sustain the proposition claimed by plaintiff's counsel as before recited. But we think plaintiff's counsel err in the application of the doctrine to this case. These authorities are in accord with the law as laid down by Chitty on Contracts, and the construction of this statute by the English courts.

As illustrating the rule, take, for instance, a merchant's account for goods sold and delivered. That is a proper matter of set-off, notwithstanding that the merchant, in order to establish his set-off, must prove that the goods were sold and delivered, and that the price charged was reasonable, and according to the price of those articles prevailing in the market at the time. So an attorney in his account for fees against his client, if no agreement has been made between the parties, if he desires to set off his claim for fees in an action brought against him, must establish that these fees are in accordance with the rule established, and usually followed by the bar, and that his services were reasonably worth what he has charged. This is done in England. It is said in Chitty on Contracts, page 954: "Although an attorney cannot recover his bill for business

done, unless he has delivered it, signed, a month before action brought, yet he may set off the amount, provided he deliver the bill before the trial; and that it is immaterial that, at the time of the trial, a month had not elapsed from such delivery."

So that in all this class of cases, where the law itself has established a rule by which the amount claimed in actions of this sort has to be ascertained, it is the proper subject matter of set-off. It has been so held in a number of cases in this country:

Cranshaw *vs.* Jackson, 6 Ga., 509; Littell *vs.* Shockley, 4 J. J. Marshall, 245; Ragsdale *vs.* Buford, 3 Hayw. (Tenn.), 192; Keys *vs.* Weston, etc., Co., 34 Vt., 81; Bridge Co. *vs.* Shannon, 6 Ill., 15; Shubert *vs.* Harteau, 34 Barb., 447; Spears *vs.* Sterrett, 29 Pa. State, 192; Haines *vs.* Prather, 10 Rich. S. C. Law, 318; Austin *vs.* Feland, 8 Mo., 309; Riggs *vs.* Moore, 14 Ala., 433.

These cases are not all, of course, like the one at bar. The case reported in 14 Alabama, 433, is the very case at bar, and the court sustained the right of an attorney to set off his claim for fees, in a suit for money which he had collected. The other authorities, however, establish the principle as before stated, that there may be a set-off where the matter rests in account, and where it is necessary to bring evidence of sale and delivery or of service, and of the value of the goods or service, before the party can recover.

It will be noticed that the plaintiff in his first and second prayers requested the court to instruct the jury that if they found that the defendant had agreed with the plaintiff for a contingent fee in the case of Dale *vs.* Anderson, they should not consider it in making up their verdict. No notice of this is made in the argument and we are at loss to understand why this request is made unless it be that such contracts are unlawful. That they are not has been repeatedly held by the Supreme Court. 110 U. S., 42; same, 305; 96 U. S., 404; 91 U. S., 252.

We discover no error in the record, and the judgment will be affirmed.

THE NATIONAL SAVINGS BANK OF THE DIS-
TRICT OF COLUMBIA, USE OF CHARLES H.
KNIGHT

vs.

PETER D. WELCKER.

PLEADING; SCIRE FACIAS; DEMURRER.

1. When a judgment creditor seeks by proceedings in *scire facias* to recover his debt from the representative of a deceased debtor, the plea of *plene administravit* is a proper plea, and if plaintiff desires to reach future assets he should not demur, but should admit its truth, and enter up judgment of assets *quando acciderint*.
2. When infant defendants interpose a plea to a writ of *scire facias*, that they took nothing by descent, and plaintiff desires to show that they took property by devise and not by descent, he should not demur, but should file a replication to the plea.
3. A defendant in a *scire facias* proceeding cannot avail himself of the Statute of Limitations by demurrer, but can only do so by plea.
4. The plea of the Statute of Limitations to a writ of *scire facias* to revive a judgment will be sustained on demurrer, where the writ does not show affirmatively that steps have been taken within twelve years to enforce the collection of the judgment.

At Law. No. 19,678. Decided November 30, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the plaintiff from a judgment quashing writ of *scire facias*. *Affirmed*.

The facts are sufficiently stated in the opinion.

Messrs. RODOLPHE CLAUGHTON and RANDALL HAGNER for plaintiff (appellant).

Mr. WM. F. MATTINGLY for defendant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This is an appeal from the judgment of the special term in a proceeding in *scire facias*. It appears that a judgment was obtained by the plaintiff against Peter D. Welcker on

the 3d of July, 1878, for the sum of \$561.83, with interest from April 13, 1878, at 10 per cent., with costs; that on the 17th day of September, 1890, this judgment was entered to the use of Charles H. Knight, and on the 23d of September, T. A. Lambert, attorney for the assignee, appeared and suggested the death of the defendant, and that Anna E. Welcker, his widow, had qualified as his administratrix, and received letters *cum testamentum annexo*; and further, that William Paul Welcker and Beatrice Welcker were the sole heirs at law of Peter D. Welcker, deceased.

On the 23d of September, 1890, the writ of *scire facias* was issued upon the suggestion of Mr. Lambert, as attorney for the assignee. This writ was directed to Anna E. Welcker as administratrix of Peter D. Welcker, deceased, and William Paul Welcker and Beatrice Welcker, heirs at law of Peter D. Welcker, deceased.

It appears that on the 23d of September, the *scire facias* was returned served as to all these parties. On November 15, Anna E. Welcker was appointed guardian *ad litem* for the infant defendants, William Paul Welcker and Beatrice Welcker.

On the 18th of December, 1890, Mrs. Welcker as administratrix, filed a demurrer to the writ of *scire facias*, assigning the Statute of Limitations as the ground thereof, and at the same time a parol demurrer was filed on behalf of William Paul Welcker and Beatrice Welcker, setting up the minority of these two defendants, and praying that their parol demurrer might stay the proceedings until they became of full age.

The plaintiff filed a replication to the parol demurrer of the infant defendants, in which he claims that "notwithstanding anything therein set forth by the defendant, William Paul Welcker, the suit ought not to stay or be respited, because he says that the said Peter D. Welcker did in his lifetime, by his last will and testament, since duly probated, devise and bequeath one-third of all his real and personal and mixed estate unto his wife, the defendant, Anna E. Welcker, her heirs and assigns forever, and the remaining

two-thirds of his real, personal and mixed estate, to his two children, the defendants, William Paul Welcker and Beatrice Welcker, their heirs and assigns, with remainder over on the death of the said Beatrice Welcker unmarried or without lawful issue, of the one-third of said estate so as aforesaid devised and bequeathed to her, unto the said William Paul Welcker, with full power to the executors therein named, to sell, release, encumber and convey the whole or any part of this estate, and this the plaintiff is ready to verify. Wherefore the plaintiff prays judgment if the suit ought to stay or be respited, and that the said defendant may answer over."

A similar replication was filed to the parol demurrer of the infant defendant, Beatrice Welcker. To each of these replications the defendant filed demurrers. On the 31st day of January, it appears that there was a hearing upon the demurrer of the defendant to the writ, and also on the demurrers of the defendant to the replications of the plaintiff, and upon this hearing the demurrers were all overruled. Thereupon it was ordered by the court that execution issue against the lands and tenements of which the said defendant, Peter D. Welcker, died seized.

On the 2d of February, 1891, upon motion of Mr. Mattingly, attorney for the defendants, "so much of the order of yesterday as awards execution on the judgment in this case is set aside and for nothing held, and the defendants are allowed to plead over."

Thereupon it appears that the administratrix filed a plea, stating that she had fully administered upon the estate, and second, that said judgment in the writ of *scire facias* mentioned was of over twelve years' standing, and that the judgment is not good and pleadable against her or to be admitted in evidence against her.

The infant defendants plead, first, that they had no lands by descent as heirs at law of Peter D. Welcker, deceased; second, the Statute of Limitations, that the judgment was above twelve years' standing.

To each of these pleas the plaintiff interposed a demurrer.

These demurrers on hearing were overruled, and thereupon the writ of *scire facias* was quashed, at the cost of the plaintiff. From this last order made by the court the plaintiff appeals.

It is quite obvious that the only question we have to determine here is whether the court was right in overruling the last demurrers. If the demurrers to the pleas interposed by the administratrix and the heirs at law were properly overruled, then the order made by the court would naturally follow, unless the plaintiff had interposed and asked leave to amend or to reply to these pleas, which was not done.

Although there was a great deal of discussion as to the rightfulness of the orders of the court in the proceedings prior to passing upon the last demurrers, yet we are of the opinion that, so far as we are concerned, on this appeal there is no reason for considering any of the orders of the court prior to filing the last pleas by defendant except for the purpose of disposing of certain arguments which are presented by counsel for the plaintiff.

The first plea here, by Mrs. Welcker, is that of *plene administravit*. It is claimed by counsel for the plaintiff that the administratrix may have fully administered upon the assets that came into her hands, and yet that does not preclude them from taking an order of execution for future assets. It is claimed that the creditor is entitled not only to execution for assets that have already come into the hands of the administratrix, but to future assets, and that it does not follow that because she has fully administered upon such assets as have already come into her hands, there may not be other assets hereafter, and that creditors are entitled to the benefit of an order for future assets.

This matter is disposed of, we think, properly, by the authority referred to by counsel for the defendant, Foster on *Scire Facias*, page 200:

"If a creditor seeks to recover his debt from the representatives of a deceased debtor, the heir of such debtor may plead *rien per descent*, or his executor or administrator may plead

plene administravit to the action; and it is then in the option of the plaintiff either to take issue on such plea and go to trial on the facts; or, if he have reason to believe such a plea to be true, he may admit its truth and enter up judgment of assets *quando acciderint*, which he has a right to do before trial, praying that his debt may be levied of such assets as may *afterwards* come to the hands of the heir, executor, or administrator, to be administered."

It seems to us this authority conclusively settles that the plea of *plene administravit* is a proper plea. The plaintiff might have said there are assets which have not been administered upon, by joining issue on that plea, or, without joining issue, he may take an order for future assets; but neither of these things has been done by the plaintiff in this case. They saw proper to demur to the plea, and the court, we think, properly overruled the demurrer.

With regard to the plea of the heirs, that they took nothing by descent, it is claimed by counsel for the defendants that the record shows by the replication which they filed to the parol demurrer of the infant defendants that Peter D. Welcker did die testate, and that he did, by that will, devise certain real estate to the infant defendants. But it must be remembered that the replication was to a parol demurrer, and that the ruling upon the demurrers filed to the replications and the order of the court made thereon, was afterwards set aside, and for nothing held. This disposed of the replications. They had performed their office. They were not in the record as replications to the plea which the infant defendants afterwards interposed, that they took nothing by descent. If the defendants desire a ruling upon the fact that there was a will in the case, and that they did take property by devise and not by descent, they should have filed replications of that character to these pleas, and if necessary applied to annul the writ.

We think the demurrer to the plea of the infant defendants that they took nothing by descent was properly overruled.

We next consider the demurrer to the plea of the Statute of Limitations, which was made by each one of the infant defendants, and by the administratrix. It is claimed in this behalf by counsel that this question had been settled by the court upon the first demurrer filed by counsel for defendant to the writ of *scire facias*, inasmuch as the reason assigned in support of that demurrer was that the judgment was above twelve years' standing, as shown by the writ on its face. It is insisted that the court, having overruled that demurrer, decided against the proposition set forth in the plea, and hence, that so far as this case is concerned, it was *res adjudicata*.

If the court had passed upon the demurrer upon its merits, and had held that the demurrer to the writ of *scire facias* properly raised the question of the statute of limitations, that position would be tenable; but we think that the demurrer to the writ of *scire facias* could not and did not raise that question. While the record does not disclose the reason given by the court for overruling the demurrer, we think the reason should have been that the demurrer did not raise the question. The question could only be raised as against the writ of *scire facias*, by plea. While the writ of *scire facias* does, in its statement of the date of the judgment, show that there was more than twelve years intervening between that date and the issuing of the writ of *scire facias*, it does not recite the record, and it is only by the record that we could ascertain that the judgment was above twelve years' standing, without any steps having been taken during that period of time.

This statute has been defined and construed by this court, and by its predecessor, and it has been held to mean that the judgment must be above twelve years' standing without any steps having been taken to enforce its collection. The issuing and return of execution during the twelve years is sufficient to prevent the bar of the statute. If twelve years do not intervene between that and the date of the commencement of the proceedings in *scire facias*, the statute cannot be pleaded.

In a proceeding in *scire facias*, the writ itself stands as the declaration, and we look to that to see whether there was any affirmative showing that the judgment was above twelve years' standing without any steps having been taken. It does not show that affirmatively, and the court will not infer that such is the case, inasmuch as it was not necessary that the plaintiff should have stated facts excluding such an inference in the writ of *scire facias*. If it be possible that there could be a case where it would be proper to interpose by demurrer the defence of the statute of limitations, the facts constituting such defence must appear affirmatively in the writ so as to exclude every inference to the contrary, or otherwise it must be pleaded, so that the question of fact may be determined properly by the evidence.

If counsel for the plaintiff had desired to test these questions upon the merits, it was their duty to have asked that they be allowed to take some other steps after the demurrers were overruled, for instance, to reply to these pleas and test their truth in that way. Not having done that, the defendants were entitled to the judgment and order which was rendered by the court.

The order and judgment of the lower court will be affirmed.

CHARLES C. HALPINE

vs.

LESTER A. BARR ET AL.

BUILDING REGULATIONS ; PARTY WALL.

1. Congress having authorized the Commissioners to make building regulations, which should have the force of law, such regulations when made, even though differing from those promulgated by President Washington, are valid.
2. One who erects a party wall between his land and his neighbor's, is the owner of the entire wall, subject to the right of his neighbor to use the wall on payment of one-half of the cost of so much thereof as he may use.
3. The purchaser of a lot with a party wall on it in which the adjoining owner has not exercised his rights, succeeds to the rights of the first builder, and he, and not the first builder, is entitled to compensation for the use thereof by such adjoining owner.

At Law. No. 32,725. Decided November 30, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Appeal by the plaintiff from order sustaining a demurrer to a declaration. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. CHARLES COWLES TUCKER and FRANKLIN H. MACKEY for plaintiff (appellant).

Mr. J. PAUL EARNEST for defendants (appellees).

Mr. Justice JAMES delivered the opinion of the Court :

In this case it appears that the plaintiff Halpine built a party wall, and afterwards sold the house and lot. Afterwards the defendants built an adjoining house, making use of this party wall, and paid for such use the person who had bought the house that was first built. The plaintiff insists that by a proper construction of the building regulations, he was entitled to be paid for the wall when it should be used, although he had sold the house. He rests this claim on the

original building regulations proclaimed by President Washington, which are in the following words:

"That the person or persons appointed by the Commissioners to superintend the buildings, may enter on the land of any person to set out the foundations and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper; and the first builder shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use or break the wall. The charge or value thereof to be set by the person or persons so appointed by the Commissioners."

Afterwards the Commissioners made a regulation in these words:

"The building owner shall pay for one-half of an existing party wall, or for so much thereof as he shall use, whether said wall be cut or not, and the quantity or measurement of wall . . . so used shall be computed by the Inspector of Buildings, unless the parties in interest agree upon some other person or persons for such purpose. The indemnity to the *adjoining owner* shall be paid by the building owner previous to cutting or in any manner using said wall at the then current price for similar work."

It was insisted on the part of the plaintiff that this change from the "first builder" to "the adjoining owner" was invalid.

As to that, I should say, first, that Congress authorized the Commissioners to make building regulations, which shall have the effect of law. That placed such regulations on an entirely different footing from general legislation of the Legislative Assembly. This court has held that the Legislative Assembly was a municipal body, and could not have authority to legislate except upon what are called municipal

subjects. That doctrine was applied to their attempt to subject equities of redemption to sale on execution. There Congress attempted to give authority to the Legislative Assembly, to legislate as of its own authority upon all subjects that were not forbidden by the acts of Congress or by the constitution. Here, Congress has said that the rules which should be made by the Commissioners shall have the effect of acts of Congress. They were declared to be in effect the action of Congress itself. They stand, therefore, on the footing of laws; and if the regulation as to paying the adjoining owner differs from the regulation made by President Washington, the alteration is valid.

We do not, however, think that it does differ therefrom. The language of the original regulation is entirely susceptible of a construction that by "first builder" was substantially meant the owner of the first building.

We have to go back to an early decision in the old Circuit Court, to understand the operation of this building regulation made by President Washington. In the case of *Miller vs. Elliot*, 5 Cranch C. C., 543, Cranch, C. J., said:

"The original proprietors of the land now composing the city of Washington, by deeds dated about the 29th of June, 1791, conveyed their lands to Thomas Beall and John M. Gantt, in trust, among other things, to be laid out for a federal city, with such streets, squares, parcels and lots, as the President of the United States should approve; and that they should convey to the Commissioners of the city, for the use of the United States forever, all streets, &c.; and that the residue of the lots should be equally divided between the United States and the original proprietors; and that the trustees should convey to the original proprietors the lots assigned to them in the division, and that the residue should be sold and conveyed to the respective purchasers. But such conveyances, as well to the original proprietors as to the respective purchasers, were to be 'on and subject to, such terms and conditions as shall be thought reasonable by the President for the time being, for regulating the mater-

ials and manner of the buildings and improvements on the lots generally in the said city, or in particular streets, or parts thereof, for common convenience, safety and order; provided, such terms and conditions be declared before the sale of any of the said lots under the direction of the President.'

"Under this provision of the trustees, the President of the United States, on the 17th of October, 1791, before the sale of any of the public lots, declared certain 'terms and conditions' for regulating the materials and the manner of buildings and improvements on the lots in the city of Washington.

"The fourth of these terms is: 'That the person or persons appointed by the Commissioners to superintend the buildings, may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built; and shall be of the breadth and thickness determined by such proper person; and the first builder shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall have occasion to make use of, before such next builder shall anyways use or break into the wall; the charge or value thereof to be set by the person or persons so appointed by the Commissioners.'"

Judge Cranch proceeded then to say:

"It is, therefore, a condition annexed to the title of every house lot in the city of Washington, that when the proprietor builds a partition wall between himself and his neighbor, he shall lay the foundations equally upon the lands of both, and that any person who shall afterwards use the partition wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use."

He did not there distinctly say who came within the description of the "first builder," but he seems to have intended that the right to build on an adjoining lot was an easement.

The question discussed here is whether it was contemplated that the wall so placed should belong to the party who built it, or was to belong at once to the two adjoining lot owners.

The theory insisted upon here is that it was not competent to rest a wall belonging to the first builder on another man's land, and that therefore it must have been intended that the first builder simply had the right to build for the adjoining owner so much of the wall as should stand upon the land of the latter, and that from the very beginning the claim of the first builder was a claim for money expended in building the wall that partly belonged to another person.

I repeat, the contention is that it was from beginning only a claim for money. It was said, it is true, that this money was not due, and that no action to recover it could arise until the adjoining owner should make use of the wall that was built for him.

What would be the result of that construction? It would be a money claim which ought to descend to the personal representatives. The administrator might administer on the estate, and close his account without collecting this debt; because it did not exist at that time. A quarter of a century might pass, and the administrator might have died. After a quarter of a century, some person would have to take out letters of administration on the estate of the first builder and bring this action. Meantime the first administrator should have reported the claim in some form as a possible asset. The impracticability of such a result shows that it could not have been intended to treat the building of a party wall as the building of a wall belonging partly to another person, and as establishing thereby a mere money claim for so doing. It must have been intended that the first builder should have an easement to build his own wall on his neighbor's land.

Nothing is said about the character of the easement; but the natural construction of the regulation is that the first builder was to rest his wall upon the party line.

As to the right to rest a wall belonging to A upon the

land of B, there certainly could be no difficulty, if it was made a condition of the purchase itself. The regulation was to be published before the lots should be allotted or sold. They were published, and they became a condition of the purchase of those lots, and each of them was purchased subject to this very right. It was therefore entirely practicable that a lot should be bought, subject to the right of the adjoining owner to rest his wall upon it.

We think that the machinery for carrying out the kind of a claim made here by the plaintiff would be impracticable, and that the inconvenience, and, I might say, with entire respect, the absurdity of the working of it, indicates that such was not the intention. The natural construction of this provision is that it was simply an easement belonging to the first builder, that he should rest his wall upon the land of his adjoining neighbor. The principle was that when the adjoining neighbor should come to avail himself of that wall, he, of course, should pay for it, and the rule provided by the regulation was that he should do so then, and not before.

We have considered this question in different lights in two cases, when we held that this was the proper construction of the privilege given to rest a wall partly on an adjoining lot.

It was said in argument that these decisions were only *dicta*. We have to say that even if they were, it was intended thereby to settle the law. They were very deliberately uttered. We thought we had settled once for all, for future cases in this court, the doctrine that a wall belonged to the person who built it. The consequence of that doctrine would be that when a lot with a house on it was sold, the wall was sold to the purchaser. Then when the adjoining building should be erected, and that wall should be used, it would be the wall of the purchaser that was used, and the liability to compensate for the use of it would be to the purchaser. The first builder who expended the money on the wall would, in the meantime, have been paid for precisely the very thing

that he now seeks to recover from the man who uses this wall. In selling the house, he was paid for the whole of the house. He has transferred the very thing for the use of which he now claims compensation.

We have reviewed carefully the grounds of our former decisions, and adhere to them, and we now hold that the payment which has been made to the present owner of the house first built, was made according to the intention of the building regulations and according to the terms on which these lots were bought.

Judgment affirmed.

THE UNITED STATES OF AMERICA

vs.

LEVI EDWIN DUDLEY ET AL.

OFFICIAL BONDS ; LIABILITY OF SURETIES.

The condition of an official bond was : " If the said D shall, and doth at all times, henceforth, and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public moneys, and honestly account without fraud or delay for the same, and for all public property which shall or may come into his hands, then the above obligation to be void ; otherwise to remain in full force and virtue." *Held*, that the sureties on such bond were liable for a balance of public moneys coming into their principal's hands during a former term of office, and for which he had failed to account, in the absence of proof that a defalcation by the officer had occurred during the former term.

At Law. No. 22,759. Decided November 30, 1892.

The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Hearing on a bill of exceptions taken by plaintiff. *Judgment reversed.*

The facts are sufficiently stated in the opinion.

The DISTRICT ATTORNEY for the United States (appellant).

Messrs. COOK & COLE and W. C. MURDOCK for defendants (appellees).

Mr. Justice HAGNER delivered the opinion of the Court:

This is an action at law brought against Dudley as the principal, and Boswell, Hinds, Hood, Browne and Webber, as the sureties on a bond to the United States in the penalty of \$100,000. The condition of the bond was: "If the said Dudley shall, and doth at all times henceforth and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public moneys, and honestly account without fraud or delay for the same, and for all public property which shall or may come into his hands, then the above obligation to be void; otherwise to remain in full force and virtue."

The declaration avers that Dudley was appointed the superintendent of Indian Affairs for the Territory of New Mexico and accepted the appointment.

The breach of the bond is alleged to be that Dudley, not regarding his duties in the premises, did not faithfully expend or honestly account without fraud or delay for all public moneys which came into his hands; but, on the contrary, did utterly neglect and refuse, and still doth neglect and refuse to faithfully expend or honestly account for the sum of \$40,923.19 of the public moneys which came into his hands by virtue of his said office, whereupon the defendants became and were and still are liable to the plaintiff in the said sum of \$100,000.

The only defendants summoned were Hood and Browne, who were the only residents of the District. Each pleaded separately *non est factum*, and issue was joined on the pleas. The result of the trial was a verdict in favor of the defendants under the instructions of the court, to which exceptions were taken by the United States.

The bill of exceptions states that Dudley, previous to the delivery of the bond in suit, which bears date April 11, 1873, had held this same office of superintendent of Indian Af-

fairs of the Territory of New Mexico under a recess appointment by the President, bearing date the 18th of November 1872, and continuing until the end of the next ensuing session of the Senate; that under said recess appointment he gave an official bond to the United States, bearing date the 29th day of September, A. D. 1872; that having been nominated to the Senate for the office and confirmed therein, during the said session, Dudley, on the 11th day of April 1873, and before the expiration of the session of the Senate, delivered to the United States the alleged official bond herein sued upon. A copy of the bond was offered in evidence under Sec. 886 R. S. U. S. which declares that when suit is brought in case of delinquency against any person accountable for public money, "all copies of bonds, contracts, etc., connected with the settlement of any account between the United States and an individual, when certified by the Register, etc., to be true copies of the originals on file, shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court." It was admitted in evidence by the court against the objection of Hood and Browne, who conceded that Dudley the principal, had signed the bond; but they declined to admit that Boswell or Hinds or Webber, the other defendants, who had not appeared and were not summoned, had also signed it, and insisted the plea of *non est factum* having been interposed by the two defendants, it became essential that the execution of the bond, as to those three obligors, should be regularly proved.

The court overruled the objection and admitted this copy of the bond in evidence, and it was given to the jury. The United States then proceeded to offer certain transcripts from the books of the Treasury, and also to prove some additional receipts by Dudley of public money, not mentioned in those transcripts, for small amounts.

The defendants objected to the reception of this transcript and of the additional receipts, because they were not properly

authenticated, and were not admissible to charge the sureties. All these objections were overruled, and to each of these rulings the defendants noted exceptions.

Finally, the United States having closed, the defendants, upon several grounds, asked the court to instruct the jury that no case had been made, and that a verdict should be returned in their favor.

All of the principal objections were assembled in the motion, but those upon which the Justice really ruled are these:

First, that under the terms of the bond in suit, the defendants as sureties, were not liable for any balance of public moneys remaining in the principal's hands received during his former term of office, at the date of said bond.

Second, that no competent evidence had been adduced, showing any such balance to be in the hands of said principal at the date referred to.

This motion having been argued, the court instructed the jury substantially as follows:

"The condition of the bond is that the principal shall faithfully account for all public moneys which shall thereafter come into his hands. Here the sureties are sought to be holden for moneys which came into his hands anterior to his appointment. The sureties did not intend to make themselves liable for such moneys. I am disposed to rest my decision on this point alone. The jury will render a verdict for the defendants."

To this instruction by the court to the jury the plaintiff, the United States, then and there excepted.

The contention of the defendants is that under the first bond, in what is called the recess appointment, Dudley had received a large sum of money; and when he was appointed to succeed himself, after the execution of the bond of the 11th of April 1873, there was charged against the second bond this same sum of money; by which proceeding, the present sureties were sought to be held liable for moneys the government had enabled Dudley to receive only by

virtue of his former appointment: for the faithful conduct under which the United States had previously accepted a bond, with a different set of sureties.

The form of the bond differs in an important respect from that stated by the Justice in his opinion. He states the condition of the bond to be that the principal shall faithfully account for all public moneys which shall *thereafter* come into his hands. The conditions of the present bond are that Dudley "shall and doth at all times henceforth, and during his holding and remaining in said office, carefully discharge the public duties thereof, and faithfully expend all public moneys, and honestly account, without fraud or delay, for the same, and for all public property which shall or may come into his hands." The contention made before us here is that each of these bonds involves only its own special responsibility for default; and that it is unjust that sureties, who are to be held only upon strict construction of their liability which is not to be extended by implication, should be held responsible for money collected by the officer under a previous bond.

The general rule is laid down in Mechem on Public Officers, Sec. 286, that sureties are bound only for default occurring during the term. In section 287, the general principle is stated thus:

"In accordance with the principles laid down in the foregoing section, it is held that sureties upon the bond of an officer continued in office for a second or other successive terms, are not liable for defaults which occurred during a preceding term, or for moneys which should have been in his hands at the beginning of his second term, but which he had appropriated to his own use during his first term, unless, of course, they were also his sureties for that term; and it is always open for them to show that the default complained of did in fact occur during a previous term for which they were not sureties. In such a case the sureties for the previous term are alone liable."

The cases there cited, and the decisions of the Supreme

Court of the United States, settle the law of this case very clearly.

Farrar vs. The United States, 5 Peters, 373, was an action against the sureties on the bond of Rector as surveyor of public lands. Rector was commissioned in June 1823, and the bond bears date of the following August. Before June he had received the amount of public money found by the jury. The defendants offered to prove that Rector had appropriated the money to his own use before the date of the bond; or, that he had paid enough of it to the United States to cover the penalty, before they became bound for him. The court below overruled this offer. On appeal the Supreme Court said (389):

"On these points we feel no difficulty in affirming that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is on the assumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time bailee to the Government; but upon the contrary hypothesis, he had become a debtor or defaulter to the Government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct. They ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defence; and whether paid away in violation or in execution of the trust reposed in him, if paid away, he no longer stood in the relation of bailee."

The condition of the bond in that case was of the most general description, namely, that he should faithfully discharge the duties of his office; but we see nothing in the form of that bond which would show that what was said there was exceptional, and would not apply to the present case.

The cases of *U. S. vs. Boyd*, 15 Peters, 187, and *Bruce vs. U. S.*, 17 Howard, 437, fully recognize this doctrine. In the

latter case the facts were very similar to those that occurred here. There was a re-appointment as Indian agent, and an alleged default under the first bond was carried over by the officers of the Treasury against the second bond.

"At the trial the defendant asked the court to instruct the jury *inter alia* :

2. "If the jury find from the evidence that Bruce was a defaulter at the time of the execution of the bond sued on, they will find for the defendant Steele to the extent of such pre-existing default.

3. "Defendant Steele is not liable for any defalcation existing on the part of Bruce prior to the 29th of August, 1844.

4. "Defendant Steele is not liable as the surety of Bruce for any money received by Bruce before he was sub-Indian agent."

These instructions were all refused, and the court below charged the jury: that if when Bruce was re-appointed agent he had money in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission, to his own use, when the bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable; and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given. The Supreme Court held the trial court was right in giving the instruction as above stated, and said: "When Bruce received his second commission, if any money or property which he received at his former term of office still remained in his hands, he was bound to apply and account for it, under the appointment he then received. The terms of the bond clearly require it, and his sureties are bound for it. It was so much money in his hands to be disbursed and applied under his second appointment. In-

deed, if it were otherwise the Government would have no security for it. For if it was not wasted or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable. For there would, in that case, be no default or breach of duty in that term of office; and if afterwards wasted or misapplied, it would be a breach of duty in that official term for which Steele was one of his sureties.

"Undoubtedly the sureties in the second term of office are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer without proof will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the Circuit Court, to show it and exonerate himself to that amount; but it could not be presumed merely because there appeared by the account to have been a balance in his hands at the expiration of his first term."

The same principle is declared in the case of the United States *vs.* Stone, 106 U. S., 525.

That such is the law generally with respect to the liability of sureties on a second bond is unquestionable. It then results that unless there is something peculiar in the language of this bond, which would render these rulings inapplicable, the court below was in error in granting the instruction.

We cannot find that there is any such peculiarity in the form of bond.

By its plain terms Dudley, during his remaining in office, undertook "carefully to discharge the duties thereof, and faithfully expend all public moneys, and honestly account without fraud or delay for the same and for all public property which shall or may come into his hands." Upon the execution of this bond, it became answerable for any money then in his hands, received by him under his first appoint-

ment, as much as if it had been sent to him from the Treasury; or as if he had collected it from a third person who had been his predecessor in office.

If Dudley, at the time the second bond was given, was already a defaulter to the amount previously received by him, and which he ought then to have had ready to turn over to whoever should be appointed to succeed him, then there would have been nothing to turn over to whoever should receive the office after the termination of the first term, and consequently it could not have been received under the second bond, and that bond could not have been held liable for the previous defalcation.

It was the right of the defendants, if they could do so, to show that Dudley was a defaulter at the inception of the liability of the sureties; that is to say, that he had not the money in bank or in his pocket, but that he had wasted it. In that case, the second set of sureties was not responsible. They have the right to show this, if they can, on another trial. It is claimed he is in fact a creditor of the Government for \$1,200; but no such proof was submitted on the trial, although the assertion appears to have been made.

However hard the decision may seem to be, the law is inexorable; and we decide the case in accordance with what we are satisfied is fixed law.

The correctness of the rulings upon the two points of evidence stated above became immaterial in the progress of the case, and we have merely stated them as part of the history of the trial.

The ruling of the court below is therefore reversed, and the case is remanded for a new trial.

JOHN PAUL JONES

vs.

BALTIMORE & OHIO RAILROAD CO.*

EVIDENCE ; NEGLIGENCE ; RIGHT OF COURT TO DIRECT VERDICT.

1. If no reason is assigned for objecting to testimony, and the testimony is admissible for any purpose, it is error to exclude it.
2. The mere act of jumping from a car in motion, but not at a high speed, does not in itself constitute contributory negligence in law.
3. Where a passenger was injured while alighting from a train from Washington to Baltimore, which he had boarded by mistake in consequence of a misleading direction by an employee within the station whom he had asked to point out the train for Gaithersburg; it was competent for him to testify, as bearing upon the question of negligence on the part of the company, that there were no signs, within the station, indicating the destination of the different trains, since the absence of such signs left the passengers wholly dependent for such information upon the officials, and the company might well be held responsible for such misdirection by its officials, resulting in injury to the travellers.
4. Where a question arises upon a state of facts, upon which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ.

At Law. No. 23,492. Decided December 5, 1892.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing upon a bill of exceptions taken by the plaintiff in an action for damages. *Judgment reversed.*

The facts are stated in the opinion.

Mr. FRANK T. BROWNING for plaintiff (appellant).

*NOTE.—This case was subsequently re-tried at special term, after which an appeal was taken to the Court of Appeals, which overruled the doctrine announced above in the second head note. See 3 App. D. C.

Messrs. MORRIS & HAMILTON for defendant (appellee).

Mr. Justice HAGNER delivered the opinion of the court:

This case has had a troublous history. It was first tried in 1883, before Justice MacArthur, and a verdict for \$8,000 was rendered for the plaintiff, after a hearing of the evidence on both sides. On appeal this was reversed by the General Term, Chief Justice Cartter and Justices Wylie and James sitting, and the case was remanded to the special term in 1885. In November of that year it came on for trial before Justice Merrick, who upon the statement by plaintiff's counsel of what he expected to prove, directed the jury to render a verdict for the defendant, without hearing the plaintiff's testimony. On appeal this ruling was reversed by the General Term, Chief Justice Cartter and Justices Cox and James sitting, and the case was again remanded for trial in May, 1886.

In December 1887, it was again heard in the special term before Justice Cox, and upon a hearing of the testimony on both sides, a verdict for \$10,000 was rendered for the plaintiff. This was set aside by the presiding justice in January 1888, and a new trial ordered. No appeal was taken from this ruling, and the case was commenced again in the special term, before Justice Merrick. After the evidence for the plaintiff was closed, the presiding justice directed a verdict to be entered for the defendant, and the present, the third appeal, was taken from that order.

The plaintiff sued to recover for damages sustained while alighting from a passenger train of the defendant company, through the alleged negligence of its officers and servants. The facts relied upon by the plaintiff, necessary to an understanding of his claim, may be thus abridged from the testimony in the record:

It appears he was a man thirty-eight years of age at the time of the accident and was then engaged near Gaithersburg, Maryland, in the service of the railroad company; he came to Washington on the evening before the accident,

and started back for his home next morning; he reached the depot shortly before 8 o'clock, and bought a ticket for Gaithersburg. As he went through the gate leading to the trains, he received instructions from the gate-keeper as to the location of the train he should take, and got upon a smoking-car in that train, where he remained until an employee of the company dressed in overalls, whom he supposed to be a laborer, entered the car and told plaintiff that car had been detached: plaintiff told him he wanted to go to Gaithersburg, and asked him where the train was, and he pointed it out on the right of the platform: he got aboard that train, just as it was moving off, and after it had gone a short distance outside the depot, while he was still upon the platform, an official came out of the car, dressed in the uniform of the company. The plaintiff testified he supposed him to be the conductor, and asked him if that train was going to Gaithersburg. He replied: "No, it is going to Baltimore, and if you don't want to go to Baltimore, you had better get off." "Acting under these instructions" (he thinking it was safe, I suppose) "I got off, with the result of breaking my arm by falling on my elbow." When asked how the accident occurred, plaintiff says: "The best of my recollection is that as I stepped off, the engineer gave the engine a little more steam, and threw me off my balance"; and that after the fall he remembers nothing. At the time of the accident, the cars were going at the rate of two and a half or three miles an hour.

The plaintiff was taken to Providence Hospital, where his arm was amputated.

On cross-examination, he testified the party whom he took to be the conductor did not address him until he asked him if that train was going to Gaithersburg; that he got off immediately, though he did not know whether it was the very second or not; he took his time; he did not ask him to stop the car and let him off; that he thought it was safe, and therefore got off; that the conductor thought so too; that he jumped from the right hand side of the car, as he be-

lieved, in the direction the train was moving; that there was no embankment at the place he jumped from the train; that he had gotten off of moving trains before, but was not in the habit of doing so; and that he had been a freight agent for several years for a railroad company in Virginia; that he did not ask the conductor to stop the train, because he supposed the conductor thought it wasn't necessary to stop it, and he thought he could get off in safety without stopping; that he did not see any peril in jumping off; there was no apparent danger to him, and he thought it was safe, as the train was going slowly; that he got off because he didn't want to go to Baltimore, but wanted to go to Gaithersburg; that he understood he would be taken to Baltimore if he did not get off then, because the conductor didn't stop; and the train continued in motion, and if he had stayed on he would have been carried to Baltimore, while he had business at Gaithersburg.

In the progress of the examination several exceptions were taken by the plaintiff to rulings of the court upon points of evidence.

The remaining evidence in the case was that of Dr. Elliott, the surgeon who performed the operation, as to the serious character of the injury.

The plaintiff having closed his case, on motion of defendant's counsel, the court directed the jury to return a verdict for the defendant, to which ruling of the court the plaintiff by his counsel excepted.

It was contended by defendant's counsel that in the former stage of the case the court in General Term had made rulings which were fatal to the right of the plaintiff to recover in this action. We have been at pains to seek for such ruling, but without success. The opinion of the General Term on the appeal from Justice MacArthur's rulings, said to have been delivered by Justice James, has disappeared from the papers. We have caused search to be made for it by the clerk, without success, and as it was never printed we have no information as to its terms that can con-

trol us. On examination we find the reasons assigned for a new trial addressed to Justice MacArthur are in the familiar form—that the verdict was against the evidence, and the weight of evidence; that the damages were excessive; that the jury disregarded the court's instructions, and that the instructions were incorrect. No mention was made of the main point presented here.

On the second appeal the reported opinion of Chief Justice Cartter embodies no such statement; but in one of the closing paragraphs the language of the court was rather to the contrary. The Chief Justice says:

"We think that within the limitations of the case, as stated by counsel, a case might be made." 5 Mackey, 14.

Evidently, if the supposed rulings had been made by the General Term at either trial, there would have been an end of the case long since.

The second exception was taken to the refusal of the court to permit a question to be put to the plaintiff which it held should have been asked in chief. This ruling cannot be considered here, as such a decision is a matter of discretion with the trial justice, and is not the subject of review.

The first and third exceptions present practically the same question. It appears from the first exception that the plaintiff was asked, "When you went to the depot that morning, what appliances, what means, were in the depot that would suggest to passengers the train they were to take?" and from the third exception, that the question asked of Mr. Tinker was, "State, if you please, the means passengers had of knowing what train to take for their different places of destination."

No reason was assigned by the defendant why the testimony was not admissible, and, under such circumstances, if it were admissible for any purpose, it was error to exclude it. *Conner et al. vs. Mount Vernon Company*, 25 Maryland, 55.

Although the point may appear of minor importance in the present stage of the case, we consider it proper to say

we think the evidence should have been admitted. The plaintiff had testified he had applied in turn to two employees of the company for information as to the train he ought to take. If there had been displayed in proper places in the depot, legible signs indicating the destination of the several trains, there would have been little, or perhaps no, excuse for his making the inquiry, or for his claim that he relied upon their statements; while proof of the absence of such proper appliances would tend to support the need of his inquiries, and the probability of his reliance upon the replies he received. This fact he was entitled to present to the jury, as tending to show negligence on the part of the defendant. There has been doubtless, a decided improvement in these particulars in many stations; but in the absence of such needful aids there cannot be a more bewildering place to one unaccustomed to traveling than a great depot filled with different trains and crowded with passengers leaving and arriving. There should, of course, be officials enough present to give answers, not grudgingly or of necessity, to those needing information; but the presence of sign boards would be a very great help to those who have a right to be relieved of such anxiety in the shortest attainable time.

The prominent question in the case is whether the court's action in withdrawing the case from the jury at the close of the plaintiff's testimony, was proper under the circumstances.

The power and right of a court to take such a course in a proper case cannot be questioned. The only inquiry before us is whether that course was justified under the circumstances in the case at bar. The more recent statements of the rule by the courts appear to be couched in more careful terms than its earlier expositions, as if designed to confine its application within narrower limits; especially where the injury involves a question of contributory negligence.

Thus in *Mackey, administrator, vs. B. & P. R. R. Co.*, 19 District of Columbia, 291, the court said:

"The court was correct in its refusal to direct a verdict

for the defendant at the close of the testimony on both sides. . . . There should be evidence adduced establishing contributory negligence on the part of the plaintiff, in relation to which fair-minded men could not draw different inferences, to justify the court under this defence, to withdraw the facts from the consideration of the jury."

So in 17 Wallace, 661, *Railroad Company vs. Stout* :

"If upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order."

The most recent enunciation of the rule by the Supreme Court of the United States is contained in the careful opinion of Mr. Justice Lamar, in *Grand Trunk Railway Company vs. Ives*, 144 U. S. On page 417, the court says:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms as applied to the conduct and affairs of men have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

On page 428 the judge thus discusses another phase of the subject, and says:

"It is earnestly insisted that, . . . as the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part the accident would not have happened; . . . the court below should, as a matter of law, have so determined, and it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: as the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so, also, the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other." Finally, on page 433, the learned Justice considers an instruction which was refused by the court below: "The reason given by the court for refusing this request was that 'It is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated, without notice of others that they may think important.' This reason is a sound one. In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* the facts and circumstances bear-

ing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others."

As no particular ground was assigned, either in the motion of the defendant, or in the order of the court for its action in the case before us, we may well assume the statement of defendant's counsel as correct, that the court gave the direction "on the ground that the facts relied on by the plaintiff and admitted to be true as stated, disclosed that want of ordinary care and caution on the part of the plaintiff which constitutes *contributory* negligence as matter of law, and defeats a recovery." It is, therefore, our duty to decide whether the testimony, upon any construction the jury was authorized to put upon it, or to draw from it, so established the plaintiff's contributory negligence that fair-minded men could not draw a different inference from it, or, as stated in the case last referred to, "that all reasonable men must draw the same conclusion from it."

Without going back to the conversation on the platform of the car from which the plaintiff jumped, it was in proof to the jury that the plaintiff addressed himself soon after the train got under way to a person who came out of the car to the platform, and asked him whether that car was going to Gaithersburg. He might well have made the inquiry, as he had received contradictory information from the two officials to whom he had already spoken on the subject. He had what one of the cases calls a strong obligation to return to his work in Gaithersburg, as his absence might lose him his place. He received the reply already quoted: "No, it is going to Baltimore; if you don't want to go to Baltimore, you had better get off." The speaker was an employee of the railroad, in its uniform, whom the plaintiff, himself a railroad man, swears he took to be the conductor. There is no evidence to the contrary, and a remark of the defendant's counsel on cross-examination in reply to the plaintiff's statement that the conductor, too, thought it was safe for him to get off—"Never mind what he thought. He

will be here to speak for himself"—appears to be a confession that such was his position. There seems to have been as much evidence that he was the conductor, as there was that the person from whom the plaintiff bought the ticket, and the person who stood at the entrance gate, and the other who was engaged in the car plaintiff first entered, were in its employment. They were all acting as if they were employees. The company cannot speak for itself. It is impersonal, and must speak and act by agents, who, within the scope of their allotted duties, can bind the company by their statements.

In *Dye vs. Va. Mid. R'y Co.*, 20 D. C., 63, this court affirmed the instruction given by the court below, that statements made by a ticket seller in Washington to a passenger purchasing a ticket, that he would go through on that ticket without change of cars, would bind the company; and the General Term went further than the trial justice, holding that it was the passenger's duty to have hearkened to a statement made subsequently by the conductor near Charlottesville, that certain passengers must change cars at that place.

In *Baltimore & Ohio Railroad Company vs. Kane*, 69 Md., 11, it was held that where a person wearing the uniform of the railroad company, and supposed to be an official, directed the plaintiff to enter a train that stood away from the platform, and she was injured in attempting to enter the train as directed, the railroad company was answerable; and that when such person told a passenger, "we have telegraphed for an extra train," and invited him to enter a shed, and when the train arrived at a place other than the platform, directed him to go and take it, these facts were sufficient *prima facie* evidence that such person was what he professed to be.

It has been contended that the reply to the plaintiff's question could not be construed as an advice to alight then and there; but must naturally be held to mean that he should get off at Baltimore or at some intervening station.

We cannot accept this view of his intended meaning. It might almost as well be said that the advice to get off should be understood to be a direction not to get off at all. To tell him if he did not want to go to Baltimore, he must get off at Baltimore, would be rather an extraordinary suggestion; and there is nothing to show that the train was to stop at all before it should reach Baltimore. Its natural meaning seems to have been understood correctly by the plaintiff. He saw the train was moving slowly, not faster than the walk of a nimble pedestrian. He must have known that as it got clear of the interlacing tracks and rows of cars that cluster near a depot, the speed would be greatly accelerated and that the train would soon approach that point, and that if he did not accept the suggestion promptly his chance of leaving the train would be altogether lost. He swears he himself thought he could jump off in safety, and he supposed the conductor thought so too. There is nothing to show the conductor moved from the spot. If he thought it unsafe, it would have been a savage act to allow the plaintiff to make the jump, without trying to dissuade him; but there was no word or act in that direction; and the plaintiff made the jump, as he believed, in the proper way, in the direction of the moving train. Had the condition of affairs which existed when the conductor advised him to jump remained unchanged for a few seconds longer, there would probably have been no injury; but the plaintiff accounts for it by saying: "The best of my recollection is, as I stepped off the engineer gave the engine a little more steam, and threw me off my balance." The engineer who thus increased the rate of speed was another employee of the defendant, and his act also was that of the defendant. The result was precisely what appeared in the case of *Washington & Georgetown R. R. Co. vs. Harmon*, 147 U. S., 571, where the plaintiff, a man advanced in life, signalled the conductor to stop a street car. The car nearly came to a stop, and Harmon was in the act of alighting, when the conductor jerked the cord; the car started sud-

denly at a greater speed, and he was thrown to the pavement and injured.

Such was the state of facts in *Baltimore & Ohio R. R. Co. vs. Kane*, 69 Maryland, already referred to, where the defendant railroad insisted the plaintiff attempted to board a train of cars while in motion, and the plaintiff testified he was thrown off by a sudden jerk of the train; and in 74 Maryland, 212, *Central Railway Company vs. Smith*, where the plaintiff was injured by being thrown to the ground by the starting of the car.

If the supposed conductor, at the instant he gave the advice to the plaintiff in this case, had pulled the cord and thereby so increased the speed to the dangerous degree, the connection of the defendant with the result might appear more intimate; but the intervening distance at which the engineer stood could not alter the fact that one agent of the defendant was altering the conditions so as to make the jump a perilous one, at the moment another agent was practically advising him it would be safe for him to make it.

It is no longer a controverted point that the mere act of jumping from a car in motion, not at a high speed, does not in itself constitute contributory negligence in law. In 61st Maryland, 60, *Cumberland Valley Railroad Company vs. Maugans*, where the plaintiff, knowing the train was in motion, stepped from it, haying at the time in his right hand a valise, which with its contents weighed from 15 to 20 pounds, and a basket of provisions weighing from 8 to 12 pounds on his left arm, while the train was moving slowly, and was severely injured, the lamented Judge Miller, in the course of a very able opinion, uses this language:

"We agree that while the question of negligence is ordinarily one of fact and not of law, cases do occur (and perhaps the number of such cases is increasing) in which it becomes the duty of the court to interpose and withdraw it from the consideration of the jury. The case, however, must be a very clear one to justify a court in taking upon itself this responsibility. It must present some prominent

and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ. Accidents occur and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule, applicable to all cases, so that a departure from it can be pronounced negligence in law. The rule that requires a party before he crosses a railroad track to stop, look and listen for approaching trains, which has been generally adopted by the courts, is the only one that approaches universality of application in reference to a particular class of accidents. But there is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion. The cases cited in the briefs of counsel on both sides show very clearly that the weight of authority is against the proposition that it is *always*, as matter of law, negligence and want of ordinary care, for a person to attempt to get off from a car when it is in motion. . . . At all events, we are clearly of opinion that, whether there was negligence or want of ordinary care in the conduct and acts of the plaintiff, under all the circumstances of this case, is a question in regard to which reasonable men may honestly entertain different views."

Again, quoting from a Michigan case, he says:

"When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

In a more recent case decided in June, 1890, reported in 72 Maryland, 519, P. W. & B. R. R. Co. *vs.* Anderson, a passenger leaving Philadelphia for Chester at night, hear-

ing the name of his station called and supposing the train had arrived at the depot, got on the car platform; the train started again slowly, and thinking the train was leaving the depot, and not wishing to be carried to the next station, he stepped off on the south instead of the north side of the road and without looking for approaching trains, and was instantly knocked down by a train going north. It appeared the train from Philadelphia had not yet reached the depot when the name of the station was called, but had stopped to await the passing of the north-bound train, and that no notice was given that the train had not reached the depot, nor were the passengers told to keep their seats. Upon the whole evidence, the defendant asked for an instruction that the plaintiff had been so guilty of contributory negligence in his manner of leaving the car as to disentitle him to recover. This prayer was refused by the court below and the jury found a verdict for the plaintiff. On appeal, after full statement and discussion of the law, the Court of Appeals declared: "We do not see how we can hold as matter of law that the plaintiff was guilty of contributory negligence because he did not look out for the approaching train before he left the car in which he was travelling. In our opinion, the whole question was properly left to the jury by the instructions given at the trial."

And yet the point ruled upon there, which the court declined to say was negligence in law under the circumstances, was the only act of negligence which, as Judge Miller says in 61 Maryland, approaches universality of application to this class of cases.

The most recently reported case in Maryland is *Western Maryland Railroad vs. Herold*, 74 Maryland, 510, decided in 1891. There the plaintiff had gone on a car with her children to a sanitarium near Baltimore city. When the train was about to return, in order to secure a seat, against the rules of the establishment she entered a car standing at some distance from the platform and before the car was prepared to receive passengers. After she was seated, a

boy loosened the brake attached to the car which caused it to descend rapidly towards the platform by its own gravity, without any person in charge. The plaintiff became frightened, and following the example of others therein, jumped off and was injured. It was held that neither of these acts, nor all taken together, would justify the court to say, as matter of law, that the plaintiff was guilty of contributory negligence; that it was for the jury to decide whether the circumstances were such as to justify a prudent person in jumping from the car.

And this seems to be the rational rule to apply to each case as it arises. An act which might be of decided danger if performed by an invalid person, or by a woman encumbered by her skirts, might be quite a safe one if done by an athletic man in the vigor of youth. It is every day's experience that scores of people get off and on the street cars, while in motion, without injury, although every such act involves hazard of injury. In Harmon's case, the street car conductor testified that the plaintiff, though an old man, was in the habit of riding on the car and getting off while it was in motion. To say that what is done daily all over the country, though certainly unwise and to be condemned, is necessarily dangerous to the point of being contributory negligence *per se*, seems too much against human experience to be a reasonable judgment.

We know, furthermore, that brakemen on trains in rapid motion even move along the top of cars and jump from one to another in safety. Every person has seen, particularly on northern railroads, two upright posts with cross-beams supporting a fringe of leather strips hanging down from the cross-pieces, which are arranged on each side of the bridges, to come in contact with the brakemen on top of the cars at night, who might otherwise forget their proximity to the bridge; and thus give them warning of the danger.

It is said by defendant's counsel, that cases like that in 61 Maryland, are not applicable to the case at bar, because in that class of cases the party was attempting to alight at

a regular station where the company was charged with a duty to deposit the passengers safely; whereas no such duty exists to set down a passenger between stations. But this consideration does not affect the question there considered, as to the negligence said to be implied from an attempt to leave a train in motion.

But we are not at all prepared to decide that a railway company has no duty to perform, under all circumstances, in landing a passenger between stations. If a passenger had been found to be traveling without a ticket and had refused to pay his fare, or if he had been riotous or disorderly on the train, the officials would not have hesitated to stop entirely and eject him, notwithstanding the supposed urgent necessity of saving a few minutes. And where it appeared that a passenger (and it might equally happen to a score of them) by misinstruction of the company's agents, had gotten on the train by mistake, there could be no propriety or right in keeping them virtually prisoners until the arrival of the train at a point, perhaps sixty miles distant from the destination to which they had contracted to carry them in safety. Such delay might cause the passenger to lose his passage to Europe to his serious pecuniary loss; or delay the traveler from reaching in time the bedside of a dying friend; or, as in the case at bar, prevent his return to his work at a proper time. Could it be possible that if a passenger from Washington should be found to have died just after leaving the depot, his mourning wife with the corpse must necessarily be carried to Baltimore, instead of being allowed to return at once to her desolate home?

The plaintiff's reason for not asking the conductor to stop is answered by the prompt suggestion made to him by the conductor to do what, it seemed to him, and as he testified to the official also believed was a safe act, considering the slow rate of the train when he spoke and the physical vigor of the plaintiff; who, as we have seen was shown to have been a railroad agent for three years, and to have gotten off of trains in motion, (as the question and answers imply), though he denies he was in the habit of doing so.

In *Pittsburgh, Cincinnati & St. Louis R. R. Co. vs. Krouse*, 30 Ohio St., 222, where the plaintiff, professing to be acting under the advice of the conductor, immediately jumped from the train moving at the rate of four or five miles an hour at a place not intended for passengers to alight, it did not appear the plaintiff acted differently from what would have been his action without the remark of the conductor; nor that he requested the train to be stopped or slacked to enable him to get off in safety. But the court held that all the circumstances, including those last named, were properly left to the jury, upon the question of contributory negligence.

It is perfectly settled that as the burden of proving contributory negligence rests upon the defendant, it must be established by a preponderance of evidence. *R. R. Co. vs. Mares*, 123 U. S., 721. Although the fact may be equally proved by the testimony of a plaintiff himself, yet we cannot in the case before us say that in the judgment of reasonable men such negligence was so established by the testimony for the plaintiff at this trial as to justify the court in declaring it was sufficient, as matter of law, to defeat a recovery. Two juries are shown to have rendered verdicts inconsistent with such a conclusion upon what seems to have been substantially the same testimony for the plaintiff; and this court in General Term, on the second appeal, used language tending to imply that the facts testified to were not such "that all reasonable men must draw the same conclusions from them," and that the question was one "in regard to which reasonable men may not entertain different views."

We are only to be understood as deciding on this point, that the evidence offered in behalf of the plaintiff was not of the character to justify the court's order in withdrawing the case from the jury. Beyond that we are not called upon to give any opinion, and abstain from doing so.

The judgment below is reversed, and the cause remanded for a new trial, where the evidence on both sides can be compared and passed upon by the jury.

JOHN C. GLICK
vs.
BALTIMORE & OHIO RAILROAD CO.

RAILROADS; USE OF STREETS.

1. In making or breaking up a train in a city station, the temporary use by the railroad company occupying the station of an adjacent street may be necessary; and to that extent, the authority to use the street grows out of the necessities of the case and is a necessary incident to the right to use the road and station.
2. But a railroad company has no right to use its main tracks and sidings for the purpose of assembling or storing cars there, loading or unloading them, or for the general purpose of shifting and making up trains.

At Law. No. 26,829. Decided December 11, 1892.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Appeal by the defendant from a judgment overruling a motion for a new trial. *Judgment affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. MORRIS & HAMILTON for defendant (appellant).

Messrs. W. A. COOK & J. A. MAEDEL for plaintiff (appellee).

Mr. Justice COX delivered the opinion of the Court:

This is an action against the Baltimore & Ohio Railroad Company for maintaining a nuisance by an illegal use of the street in front of the premises of the plaintiff. The residence of the plaintiff is on First street, east, between I and K streets, in the vicinity of what is called the Y, or bend, which connects the Metropolitan Branch of the Baltimore & Ohio Railroad with the original line of the road.

The complaint is that the defendant was in the habit, between June 3, 1883, and June 3, 1884, of parking or storing its cars on the sidings and main tracks on the street at

this point, and leaving them there for an unreasonable length of time, and making use of the street for the purpose of making up its trains; the consequence of which was that smoke and cinders from the engines, and unpleasant odors from the cars left standing on the tracks, sometimes cattle cars, found their way into the dwelling of the plaintiff, to the no small discomfort of himself and his family.

There was evidence offered on both sides—contradictory evidence—as to the facts. There were also instructions asked on both sides, and the case resulted in a verdict for the plaintiff, for the sum of \$500. A motion was made for a new trial on all the customary grounds, which was overruled, and an appeal taken from that order to this court.

In the argument in this court, the only contention, substantially, is as to the propriety of the granting of one of the instructions which was given at the instance of the plaintiff, and the failure to explain it away in the charge of the court if it is erroneous.

By virtue of an act of Congress of March 3, 1835, and a subsequent agreement with the corporation of Washington, the Baltimore & Ohio Railroad Company acquired the right to enter the city of Washington and construct its original road upon its present location, and establish its station at its present site. By subsequent legislation, the Metropolitan Branch was also authorized.

It is difficult for a court, unfamiliar with railroad management, to define the use of the street which may be considered as necessarily incident to the privilege thus conferred. We have hertofore undertaken to point out some of the limitations to which it must be subject. Thus, in *Neitzey vs. The Baltimore & Potomac Railroad Company*, 5 Mackey, 34, we held that the Baltimore & Potomac Railroad Company could not use the street for the purpose of loading and unloading its cars, because it would be converting the street into a freight yard. The same rule, of course, is applicable to the present defendant.

In the case of *Hopkins vs. Baltimore & Potomac Railroad*

Company, 6 Mackey, 311, we held that that company was not authorized to use Maryland avenue, one of the streets in the city, as a general shifting ground for making up trains, and that the only use which could properly be made of the street for shifting cars was such as was "reasonably necessary for the purpose of carefully taking its cars into, or of carefully taking its cars out of the station, to place them in freight trains on the track."

And in the present case, on a former hearing in this court, we held that sidings and the main track in the street could not be used for parking cars and for coupling and shifting cars generally, and overruled the decision at a special term that they might be used as side tracks are ordinarily used for the purposes mentioned. We held that while that might do in the country, the streets of a city could not be used in that way.

It may be proper, on the present occasion, to state somewhat more fully to what extent we are prepared to recognize the railroad company's right to use the street otherwise than in the mere process of passing over it, in the act of transporting passengers or freight.

The present station is confined to square 632. It cannot be enlarged except by both acquiring additional private property, and enclosing public streets, neither of which the company is now authorized to do. But it is not only probable, but plainly apparent, that the freight trains which it is necessary to make up for the proper conduct of the company's business cannot be made up within the limits of the station; that the cars have to be stored on different tracks in the station, and in making up a train it may be necessary to pull out the cars from one track, then to back on to another, and connect with the cars on that, and so on; and to pursue the reverse of this course in conveying the cars of a long train into the station. This necessarily involves a temporary use of the street adjacent to the station, for the purpose of making or breaking up a train, in the manner mentioned, and to that extent, the authority so to use the

street would seem to grow out of the necessities of the case and to be a necessary incident of the right to use the road and station. As we said in *Neitzey vs. Railroad Company*, this would seem to be the very object of the tracks at or near the station, which are authorized in any number that the president and directors may deem necessary; and such was the use which we referred to in the case of *Hopkins vs. the Baltimore & Potomac Railroad Company*, as reasonably necessary.

But the moment that we go beyond this, we shall be completely at sea. If the mere expansion of the company's business were sufficient to justify it in doing everything that might facilitate its management, then there would be no end to its encroachments on public and private interests. It could spread out from the station, as a center, to all points of the compass, occupying the streets in all directions for loading and unloading, parking and shifting cars, and making up or undoing trains, to the utter detriment of all the private property in the neighborhood. Of course, this is inadmissible, and the great development of the company's business simply requires it to seek legislative sanction for the extension of its terminal facilities.

We have thus indicated in a somewhat general way the legitimate use to which we think the street could be put, but it would be impossible to foresee all the contingencies and circumstances which might require us to modify or extend these views. Accidental detentions or obstructions might change the situation.

But the use which we have spoken of as probably unavoidable, and therefore legitimate, would seem to be quite a different thing from placing and assembling cars on the sidings or main track in the street, for the purpose of shifting them and making up trains there, which seems to be the ground of complaint in this case.

And this leads us to consider the exceptions on the part of the defence to the rulings of the judge in special term.

The fifth instruction given at the plaintiff's instance was:

"That if the jury believe from the evidence that on or near the residence of the plaintiff, from April 3, 1883, until April 3, 1884, the defendant maintained a side track called No. 4, and placed, or caused to be placed thereon, cars, loaded or unloaded, for a greater or shorter time, and made up or shifted cars thereon, with the aid of engines under the control of conductors and other employees, and with fires of coal and steam, and that from such use of the sidings the plaintiff suffered inconveniences, annoyances and damages, he would be entitled to recover in this action."

The criticism on this instruction is that it ignores and negatives the right conceded in the Hopkins case to such use as may be reasonably necessary for the purpose of taking the cars into and out of the station, especially as it applies to a use of the siding for any period of time—a greater or shorter time.

It is only due to the Justice who tried the case to consider to what kind of testimony this instruction was addressed. The evidence on the plaintiff's part tended to show that cars were left standing on the street near his house for long periods of time, and were there moved and shifted about and made up into trains. Indeed, the yard-master of the company, himself, also testifies that there were some empty cars kept at First street, between I and K, and adds: "We did place empty cars on the west track."

It is to this alleged case that the instruction seems directed. It condemns the placing, that is, the assembling of cars in the street, and the making up and shifting on the street. So understood, it does not clash with what we have heretofore said, and harmonizes with what we now say, and does not seem obnoxious to the objection made to it.

If the instruction is not erroneous in itself, there was no error in the omission to modify or explain it into harmony with what we had previously held. It is complained that the jury were not instructed as to the reasonable use of the streets which the Hopkins case justifies. But if that was necessary, the Justice has really only anticipated the fuller

expression which we, now attempt to give of the briefly outlined opinion in the former case as to the right to break up the trains in getting them into the station.

The sixth instruction asked on the part of the defendant was: "The jury are instructed that the defendant was entitled to use the tracks and sidings on First street between I and K streets, with its freight trains and cars and engines for such time as was reasonably necessary to place the same in the freight yard of the defendant."

This instruction undertakes to give the law as laid down by us in the former case of *Hopkins vs. The Baltimore & Potomac Railroad*. As we read the record, this instruction was given subject, however, to a further explanation by the court, and that is the law of the case, unless the explanation itself explains away the instruction.

The explanation in the charge of the court is as follows: "What I meant to say was, and what I do say is, that the defendant railroad company had a right to have its tracks there. They had a right to run their cars over their tracks. They had a right to do any reasonable, proper thing there; as, for instance, suppose they should run down there some day to the entrance of the yard, and see the track obstructed by something in the yard, they would have the right to stop there a reasonable time, until they could get into the yard, undoubtedly. They would have a right to do that. Perhaps they would have a right to go back, or back and forward again, or cut their train in two and pull part of the train in and then go back and get the balance of it and pull it in; but while that is true, they had no right to use that street for the purpose of parking cars, as it is called, or storing cars or loading cars, or shifting cars, or making up trains—the work that belongs to station grounds, to depot grounds—they had no right to use that street for those purposes; and if they did do that; if they made up trains there, allowed cars to stand there, stored them there, shifted them there, parked them there, or their engines, and the plaintiff suffered annoyance, inconvenience and damage because of

that occupancy, then the case is made out, and the plaintiff would be entitled to recover."

We do not see that what is called the explanation in the charge of the court affects the force of the instruction which was asked by the defendant and which was given with this explanation. The court went a little further and more fully into the question of what is a reasonable use of the street than we did in the Hopkins case; but we substantially say now what was said by the justice below on the trial.

We see no error, therefore, in this part of the instruction.

The eighth instruction prayed by the defendant asks somewhat too much. It claims the right to the company to move one car at a time into the station, out of a train of whatever length, the effect of which would be a virtual appropriation of the street for an indefinite time, without the slightest necessity for it. It would, in effect, be offering a pretext to the company for occupying the streets, if it could take a whole train and move one car at a time only, into the station. What is reasonable in the instruction, it seems to us, was substantially embodied in the charge of the court, which I have just read.

This disposes of all that is seriously contended for in argument on this appeal. We think that the order of the court below, overruling the motion for a new trial, *must be affirmed.*

FRANK J. BELL

vs.

KATE SHERIDAN.

CONSIDERATION; FRAUD; PLEADING; RECOUPMENT; BILLS OF EXCEPTIONS.

1. A general exception to the admission of evidence without specifically pointing out the ground therefor will not be considered on appeal.
2. When a motion to take a case from the jury, is overruled, and an exception noted, the exception is considered waived if counsel excepting afterwards produces other testimony.
3. Where the charge of a trial court contains any propositions which are correctly stated, a general exception to the charge, specifying no particular errors will not be noticed on appeal.
4. In an action against the maker of a promissory note given for the price of goods, it is competent for the maker to prove in reduction of damages that the sale was effected by fraud and misrepresentation on the part of the payee as to the value of the goods, although the goods have neither been returned nor tendered.
5. Such proof of fraud, showing a total want of consideration, may be introduced without pleading it specially or giving special notice thereof before the trial.
6. In an action by a payee of a promissory note against the maker thereof, when a special notice is necessary before trial that the maker expects to introduce evidence showing that the goods for the price of which the note was given were not worth the sum named therein, and that the note was procured through the fraud of the payee, pleas setting forth lack of consideration and fraud by the payee, accompanied by an affidavit setting forth the facts relied on as a defence, constitute a sufficient notice.
7. Where a bill of exceptions purports to set forth all the evidence, but it is apparent from other statements therein that evidence was offered which is not set forth, an appellate court will not attempt to determine the sufficiency of the evidence to sustain the verdict.

At Law. No. 30,075. Decided December 12, 1892.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Appeal by the plaintiff from an order overruling a motion for a new trial. *Affirmed.*

The COURT in its opinion stated the case as follows:

This action was instituted on a promissory note executed by the defendant to the plaintiff for \$124. The defendant

interposed six pleas, which it is proper to state with some detail, as follows: First, that the note sued on was not given for value received, and is now and has always been since its execution held by the plaintiff without consideration; second, that it was obtained by false and fraudulent representations made by the plaintiff, to the effect that the plaintiff held a bill of sale from one Sheridan, the brother of the defendant, for certain goods and chattels which Sheridan had bought for the defendant from the plaintiff, then in a storehouse which the defendant was at that time carrying on in Washington city, and that unless she should pay the balance then due by Sheridan on the bill of sale, he would proceed under its authority to take the goods out of the store, whereas, in truth, the plaintiff had no such bill of sale; and that by reason of these fraudulent representations the defendant was induced to make the alleged note; third, that it was obtained by duress; fourth, that she never promised as alleged; fifth, that she is not indebted; and, sixth, that at the commencement of the suit, and ever since, the plaintiff was indebted to the defendant in the sum of \$1,495 for money had and received by the plaintiff of the defendant by means of deceit and fraud practiced upon the defendant by the plaintiff, and for money involuntarily paid by the defendant to the plaintiff by a mistake of facts, as appears by the annexed bill of particulars, which amount the defendant is willing to set off against the plaintiff's claim.

Appended to these six pleas was an affidavit, setting forth the particulars of these defences.

On April 8, 1892, which was one year and four months after the pleas were filed, and just as the case came on for trial, the defendant obtained leave to withdraw her plea of set-off, and the trial proceeded upon the remaining pleas.

At the trial the plaintiff proved the execution of the note, and there rested. The defendant then testified that at the suggestion of her brother she had sent on to him in Washington a sum of money which she authorized him to apply to the purchase of the good will, fixtures and stock in trade which

the plaintiff Bell had in a grocery store in this city; that after she had sent on the money she learned for the first time that her brother had become insane, and that while in that condition he had gone to Bell's store to complete the bargain; that in consequence of his mental condition he was imposed upon by Bell's misrepresentations and induced to agree to give \$1,900 for the goods, although they were worth only about \$340; that Bell, after the bargain had been made, removed a quantity of the goods included in the sale from the store; that many of the remaining goods were utterly valueless, consisting of pieces of old iron and other trash; that every article was rated by Bell at an exaggerated value, and that Sheridan, her agent, was in every way imposed upon by Bell; that at the time the note was given Bell had told her he had a bill of sale from Sheridan of these goods, and if she did not pay quickly the balance due on them he would turn her out in the street and take the goods; and that she thereupon paid him \$300 in cash, and gave him this note for \$124 for the alleged balance.

This evidence was given without objection, and similar testimony to the same effect was given by seven witnesses in her behalf without objection. The defendant having rested, the plaintiff moved the court to take the case from the jury, which motion was overruled.

After the overruling of the motion, the defendant produced additional testimony by four witnesses of the same general character as that previously given by the seven witnesses, who, as has been stated, had testified without objection; and this last testimony was given "over the objection of the plaintiff."

When the defendant again rested, the plaintiff renewed the motion to take the case from the jury, and direct a verdict for the plaintiff, which motion was also denied. Thereupon the plaintiff produced a number of witnesses whose testimony tended to contradict all of the allegations which had been made by those of the defendant.

The case was then closed, and, without any request for

instructions from either side, so far as the record shows; a charge was given by the court, and the jury rendered a verdict in favor of the defendant.

Messrs. H. O. CLAUGHTON and JOHN E. LATIMER for plaintiff (appellant).

Mr. E. H. THOMAS for defendant (appellee).

Mr. Justice HAGNER after stating the case as above, delivered the opinion of the court:

The case has been argued here as if there were several exceptions before us, proper for our consideration, but the court is not at liberty to consume time in noticing most of them, because they are not properly presented. Those referring to alleged errors in the admission of the evidence of four of the defendant's witnesses, disclosed no ground for the objection, the statement in the record simply being that to the admission of the evidence the plaintiff objected. It has been decided so often that an appellate court will not notice such an exception, that it is not necessary to consume any time in their consideration. *Noonan vs. Caledonia Mining Co.*, 121 U. S., 400. Besides, we could not conclude that the verdict would have been different if the testimony of the four witnesses objected to had been excluded, as seven witnesses had already testified to the same effect, without objection.

The second series of exceptions was taken to the refusal of the court to take the case from the jury after the defendant had first declared she had closed, and again to a similar refusal after she had finally closed her evidence. The court having overruled these motions the plaintiff adduced other testimony, which it is well settled constituted a waiver of his exception to the overruling of his motions to take the case from the jury.

The next exception which was taken was to the charge of the court, and is in these words: "To which said charge, and to so much of the same as submitted to the jury the ques-

tion of fraud, misrepresentation and cheating, the plaintiff excepted."

It has been repeatedly decided that where the charge contains any propositions which are correctly stated, a general exception specifying no particular errors will not be noticed on appeal.

But waiving this objection, we come to the consideration of the very interesting question which it is said the plaintiff intended to present, viz., whether in an action on a promissory note it is permissible for the defendant, with or without a special plea directed to the particular point, to recoup to a partial extent or to defeat the action to the entire extent of the note, for fraud in the obtention of the note, or in its consideration, where it is admitted that the party who gave the note retained the goods and made no offer to return them.

This question was discussed in *Groff vs. Hansel*, 33 Md., 164, which was an action by the payee against the maker of a promissory note, to which the only plea was *non assumpsit*. It appeared the defendant had purchased from the plaintiff a patent right, and agreed to give a certain amount for the right to use the invention within a circumscribed limit in the State of Maryland. He paid a part of the purchase money in cash, and gave two notes for the balance, and the note sued on was for the final payment. Proof was offered on the part of the defendant tending to show that the sale was effected through false and fraudulent representation on the part of the vendor as to the qualities, capabilities and usefulness of the invention. The court said: "The legal proposition asserted in the two prayers of the plaintiff is that this defence cannot be set up in this action on the note because the defendant did not return or offer to return, or surrender or re-assign, the patent within a reasonable time after he knew or discovered that the article did not answer the representations made of it by the plaintiff, but still retains and holds the assignment of the same."

As to the question whether there was a necessity for an

offer to return the goods and property, the court says: "If the action is by the vendor for the price, the defects may be shown in reduction of the plaintiff's damages where they are less than the price unpaid, or in bar when they are equal to or exceed such price. By proving fraud and damage, the vendee may reduce the demand where the injury is less than the price unpaid and where it is equal or greater may defeat the action altogether. This is authorized by law to prevent circuitry of action. In all cases of fraud, the vendee, who alone has the right of disaffirmance, may remain silent and bring his action to recover damages for the fraud, or may rely on it by way of defence to the action of the vendor, although there has been a full acceptance by him with knowledge of the defects in the property. An affirmance of the contract by the vendee with such knowledge merely extinguishes his right to rescind the same. His other remedies remain unimpaired. The vendor can never complain that the vendee has not rescinded."

Addressing itself to the second point, the court says: "A distinction is taken in some of the cases and in England still adhered to, between a suit upon the original contract of sale or for the agreed price, and a suit upon a note for the security taken for the contract price on such sale. But this distinction has also been repudiated and rejected by the best considered cases in this country, and it has been held that where the suit is between the original parties to a promissory note, the defence may be relied on."

The court cites *Harrington vs. Stratton*, 22 Pickering, 510. There the court decided that in an action against the maker of a promissory note given for the price of a chattel, it was competent for the maker to prove in reduction of damages that the sale was effected by means of false representations of the value of the chattel on the part of the payee, although the chattel had not been returned or tendered. See also 2 Benjamin on Sales, ¶1267.

To the same effect is *Withers vs. Green*, 9 Howard, 230. There the action was on a single bill for \$3,000. In Ala-

bama, where the suit was brought, single bills stand on the same footing as promissory notes with respect to pleadings. The defendant insisted he had been induced to give the single bill as the purchase money for a horse, the pedigree of which had been circumstantially stated by the seller, but which was proved to be untrue. Upon the question whether he had a right to retain the horse and claim a reduction of the original price, the court sustained his right to do so.

In *Harman vs. Bannon*, 71 Md., 429, where suit was brought on a promissory note given for a purchase of cord wood, the maker was allowed to recoup against the note the amount of his loss from failure of the vendor to allow the maker to convert the wood into charcoal on the vendor's land, as he had agreed might be done by the vendee when the wood was purchased. The proof showed there had been no return of the wood, which had been removed and coaled by the plaintiff elsewhere, and there was no pretence there had been any offer to return it.

The next question is, was it necessary specially to plead the fraud, or give special notice of the defence to the plaintiff in advance of the trial? The contention of the plaintiff is that no special notice was given in advance of the defendant's intention to rely on this defence, and that there existed at the time of the trial no special plea setting up the fraud, since the plea of set-off, which it is insisted was the only one that distinctly raised the question had been withdrawn before the case went to the jury. But this does not seem to be the uniform view taken by the cases, even where there is no question of fraud involved. In the case in 33d Md., 164, above referred to, there was no special plea and no notice. In 33d Md., 63 (*Warfield vs. Booth*), a country physician sold his good will and practice to another physician for a certain sum in cash, and received several notes for the residue of the purchase money, all of which, except the last, had been paid. Afterwards the vendor, in violation of his contract, came back and undertook to practise in the same locality again; and the vendee of the good will

brought an action for the breach of the contract. The only plea of the defendant noticed by the court was that the plaintiff had not complied with his part of the contract, because he had not paid the last note. The only question presented on appeal was whether the amount of the unpaid note could be recouped against the unliquidated damages which might be recovered for the violation of the contract, and the court sustained the right of recoupment under the plea referred to, and without any other plea or previous notice.

It is insisted the Supreme Court in *Dermott vs. Jones*, 23 Howard, 235, declared that recoupment could not be allowed unless the defendant had filed a definite claim with notice, sufficiently long before the trial to enable the plaintiff to meet the matter with proof. That decision was made nearly thirty-five years ago, when the defence of recoupment had then recently been introduced into practice. Since that day it has become a very common defence and one greatly favored by the court to avoid circuitry of action. Assuming this utterance correctly represents the opinion of that court at this time, upon the very state of the case there presented, it is enough to say it was not made in a case where the defence went to the total invalidity of a note or contract sued on, or where the defence was fraud against the cause of action itself.

The distinction is well taken in 8th Cowan, 31, in the case of *Hills vs. Bannister*, which was an action brought against a bell-founder who had made a bell for the plaintiff. At the time of the delivery of the bell, the defendant agreed if the bell should crack within a certain time, he would, upon application, replace it with another. The vendor brought his action for the price of the bell, and the defendant, without plea or notice, interposed the defence that the bell had cracked, and that when he went to seek out the plaintiff to claim under his agreement and demand another bell, he was not to be found, having left the neighborhood; and that he had been unable to find the whereabouts of the plaintiff until the suit was brought. Upon the question whether this

defence could be maintained in the absence of a special plea or of notice, the court declared: "Under the general issue in *assumpsit*, any matter which shows the plaintiff has no cause of action may be given in evidence. 1st Chitty's Pleadings, 472. In this case there was not a total failure of consideration, for the bell, although cracked, was of some value. It is not pretended that there was any fraud or deceit. Had there been, it would have been competent proof under the general issue. *Sill vs. Rood*, 15 Johnson, 230. And it seems that if the unsoundness of an article may produce a partial diminution of value, it may be shown in mitigation of damages, provided there was a fraudulent representation." The same distinction is held in *Gleason vs. Clark*, 9 Cowan, 59.

In the case at bar the defence offered evidence distinctly to prove fraud and deceit on the part of the plaintiff in attempting to sell property to an insane and drunken man for a grossly exorbitant price, and also deceit and fraud in almost every respect in which such a sale could exhibit those features; so that, according to the distinction taken, as the defence was fraud in every feature of the transaction, and a total want of consideration, the authorities show it was not necessary either to plead the defence specially or to show a previous special notice before the trial began.

But if it had been necessary, we think the requirement was abundantly complied with in the case at bar. The second plea, more particularly, was a sufficient information to the plaintiff that fraud was to be relied on. The first plea alleged a total want of consideration, which comes within one of the categories spoken of in the case in 8th Cowan; but the second plea was a circumstantial statement that this note was obtained by false and fraudulent misrepresentations concerning the alleged sale and the delivery of the notes. It is true the plea of set-off which the plaintiff admits was a sufficient charge of fraud, was withdrawn; but in its absence the remaining pleas were an ample notification that the plaintiff's fraud was to be relied on to prevent a recovery, and this is demonstrated beyond doubt when we

examine the affidavit of the defendant attached to the pleas and applicable to all of them, and which sets forth the reasons why the several pleas thereto annexed, in the belief of the defendant, were true.

This affidavit thus made one year and four months before the trial came on, must of course have apprised the plaintiff that the defendant intended to rely upon the very matters which were afterwards offered in evidence; and it would be absurd to say that the plaintiff went to trial in ignorance that this particular defence would be interposed.

The grounds for a new trial are in the usual form. The first and second are that the verdict was contrary to the evidence, and that the verdict was against the weight of the evidence. But it appears upon the face of the record that it does not contain a complete statement of the evidence. On page 16 of the record this language is used: "And this, together with the evidence set out in the plaintiff's first and second bills of exceptions, which are hereby made a part of this bill of exceptions, was all the evidence that was offered at the trial."

It is insisted we must conclude from this statement that all the evidence is contained in the exceptions. But the authorities establish the rule that if the same paper which asserts the exception contains all the evidence, also shows there was other evidence offered which is not set forth, and which may have been very material, the appellate court will disregard such a general statement, and hold the entire testimony has not been presented. In *Thames Loan and Trust Co. vs. Beville*, 100 Indiana, 313, the court said: "It clearly appears by the bill of exceptions that it does not contain all the evidence rendered on the trial of the action, although it purports to do so. In the absence of the omitted evidence we cannot examine that which is in the record to determine its sufficiency to sustain the verdict."

Again, in *Shimer vs. University*, 87 Ind., 218, and *Johnson vs. Wiley*, 74 Ind., 233, it is held that where a bill of exceptions affirmatively shows that it does not contain all the

evidence, this court will not consider any question which requires for its full understanding and correct decision, an examination of the entire evidence given on the trial, even though it contains the statement that "this was all the evidence given upon the trial of the cause."

To the same effect is a later case in 110 Indiana, 147 (Garrison *vs.* the State).

There are three particulars in which it is manifest the fact is inconsistent with the general statement in the exceptions. On page 6 of the record there is the statement of evidence going to prove the insanity of Sheridan. It is also admitted by plaintiff's counsel that there was testimony he was drunk or on a frolic about the time of the alleged sale, and there was evidence given by Dr. Marmion and another physician, to the effect that he was more than drunk, and was then really crazy. Whether he was *non compos mentis* or asleep and unconscious of what was going on while the inventory was being made is an important point. One of the witnesses for the defendant stated he was present all the time Sheridan was there, and that Sheridan was cursing and swearing and acting like a crazy man. Then follows this statement: "The witness produced an advertisement in the 'Star' of the 22d of June, 1889, and it was read to the jury." We may conjecture what was in that advertisement, but there is not one word in the record as to what it contains. And yet it was read before the jury, and may have had an important influence in controlling their judgment. Again, on page 7, Browning, a witness of the defendant, testifies over the objection of the plaintiff, that he examined Sheridan's store and made memoranda of the prices; and the book containing these memoranda was offered and admitted in evidence as tending to show that the prices as fixed by the inventory of plaintiff were grossly excessive. But that book is not before us, nor are its contents set forth in the record. It is highly proper and essential that we should have the same privilege the jury had, of examining these items of testimony, since we are to pass upon the reasonableness of their verdict.

Again, on page 8, it is stated the defendant offered in evidence an inventory taken by Browning, and referred to in his testimony. That inventory is not here. If it were important to show it to the jury, it is important to show it to this court.

But if we were to assume the record contained all the evidence, we could not reverse the finding of the jury in this case, for, allowing them the right to credit one set of witnesses rather than another, we see nothing to justify us in saying they were not fully authorized, under the conflict of evidence, to find as they did for the defendant.

The judgment below is therefore affirmed.

UNITED STATES

vs.

HOWARD J. SCHNEIDER.

INDICTMENT; POSTPONING TRIAL; CHALLENGES; COMPETENCY OF
JURORS; VERDICT; RES GESTAE; DYING DECLARATIONS;
MURDER; LIST OF WITNESSES; EVIDENCE;
PRAYERS; EXPRESSION OF OPIN-
ION BY COURT.

1. An indictment coming from the grand jury room bearing in its caption the words: "District of Columbia, County of Washington," contains a sufficient statement of the place of the commission of the crime charged in the indictment, when the only averment of the place is a reference to the venue laid in the caption.
2. The public interest requires prompt investigation and punishment of crime, and where the record in a capital case contains no showing of public clamor or other sufficient reason for delay, the refusal of the trial justice to postpone the trial is not error.
3. If a juror in a criminal case is erroneously judged competent over the challenge of the defendant *for cause*, and the defendant is compelled to challenge him *peremptorily* in order to exclude him from the panel, and when the jury is completed and ready to be sworn, he has exhausted his peremptory challenges, the error is an injury to him, and is ground for the reversal of the judgment against him.

4. In a criminal case, a juror will come within the requirement of impartiality, although he may have formed and expressed an opinion based upon rumor or newspaper accounts and although he may require evidence to change his opinion, if notwithstanding this, he can, in his own judgment, or in the judgment of the court based upon the whole examination, render an impartial verdict according to the law and the evidence, and the finding of the court upon that issue will not be set aside unless the error is manifest.
5. An affidavit charging a juror in a murder case with having expressed an opinion which disqualified him from serving, is offset by an explicit denial by the juror under oath.
6. The declarations of an injured party, as well as those of third persons, where such statements are the immediate concomitant and result of the principal fact, may be received in a murder case not only to show the nature of the injury, but also the cause.
7. Dying declarations are admissible in evidence if it satisfactorily appears in any way that they were made under the sanction of impending death; whether that fact be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants stated to him, or from his conduct, or other circumstances of the case, all of which may be resorted to in order to ascertain the state of the declarant's mind.
8. If a man is shown to have fired several shots into another person at close quarters, from which death results, the act is presumed to be intentional and malicious, even without any direct proof of motive, express malice or premeditation, and no inference that it was accidental could be justified by the mere conjecture that it might possibly have been accidental, or by the general presumption of innocence.
9. If one person intentionally kills another without provocation from the latter, the fact that it was done under a sudden impulse of anger, or in resentment for a third party's interference between them, or in revenge at being fired at first by a third party, would make the crime none the less murder.
10. In a capital case, evidence as to the opinions of witnesses as to the number of pistol shots fired is properly excluded, where the witnesses testify as to all the facts within their knowledge in reference to the shooting.
11. Section 1033, R. S. U. S., does not preclude the government in a capital case from making use of any material testimony discovered during the progress of a trial. All that the section exacts of a prosecuting officer is that he shall, in good faith, furnish to the prisoner before the trial, the names of all the witnesses then known to him and intended to be used at the trial.
12. The order of proof in a capital case may be regulated by the trial justice, in his sound discretion, and it is not only his right, but his duty, where, in his judgment, justice requires it, to admit evidence at any stage of the case, though the party has no strict right to offer it. After the defendant's case is closed, the trial court may admit evidence in criminal cases which is strictly evidence in chief.

13. A long, painful and laborious trial of a capital case will not be held abortive because one of a cloud of witnesses is shown to have said something calculated to wound the feelings of one or more jurymen, which might result in a possible or conjectural detriment to the cause of the defendant, of which no actual trace can be seen.
14. It is never a collateral matter to show a personal interest of a witness in a suit, and where it is manifested in an effort to punish another witness for his testimony, it is especially relevant.
15. Although the verdict to which each juror agrees, must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them, and with due regard and deference to the opinions of each other.
16. It is not correct practice to single out isolated facts and ask instructions as to their legal effect, when a number of facts and a whole course of conduct are relied on, collectively, as showing a motive in a capital case.
17. It is an invasion of the province of the jury to charge, that when a good or a bad motive for doing an act can be imputed to the person committing it, the law says the good motive must be imputed, if the same can be done from the evidence reasonably to the satisfaction of the jury.
18. A judge of a United States Court, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts. When no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expression of opinion is not reviewable on a writ of error.

Criminal Docket. No. 18,856. Decided January 9, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on a bill of exceptions taken by the defendant in a trial for murder. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. J. M. WILSON, A. A. HOEHLING and WM. F. MATTINGLY for defendant (appellant).

Mr. C. C. COLE, United States Attorney for the District of Columbia, and HOWARD CLAGETT, Assistant, for the United States (appellee).

Mr. Justice Cox delivered the opinion of the Court:

I am requested to deliver the opinion of the court in the case of the United States *vs.* Howard J. Schneider, indicted for the murder of his wife, Amanda M. Schneider, in this city, on the 31st day of January, 1892.

The defendant having been convicted in the Criminal Court, appealed to this court.

The record of the trial contains between 100 and 200 exceptions, and the record and brief embrace some 540 pages of printed matter. The case has been argued at great length, with remarkable ability and exhaustive learning, and its proper examination by us has required much time and labor, and has been conducted with an earnest desire, in arriving at a conclusion, to pay a due regard alike to the rights of the prisoner and the demands of public justice.

I shall not undertake to examine the several exceptions in detail, but will confine myself principally to an examination of the questions which are raised by them. The record also presents so many questions that it is impossible to discuss them all at length, and as to some of them, we shall content ourselves with a general expression of opinion, without consuming the time that would be necessary to sustain it by reasoning and authority.

The first question arose on a motion to quash the indictment because there was no averment as to the place where the alleged offence was committed, so as to bring it within the jurisdiction of this court. The caption of the indictment contains the words "District of Columbia, County of Washington," and the body of the indictment describes the place as at and in the County and District aforesaid. It is claimed that the caption is no part of the indictment, and therefore the reference does not remedy the omission of a proper description in the body of the instrument.

We think this question depends entirely upon local practice. Where the practice is for the clerk of the court to add the caption, of course the indictment, as it comes from the grand jury, would be defective in the shape which the present one bears. But where, by the practice, the caption is a part of the indictment as it comes from the hands of grand jury, the rule is different. It was so held in Massachusetts, where the latter practice prevails. See *Comm. vs. Edwards*, 4 Gray, 1. And such has been the practice here.

Such was the form of the indictment in the Sickles case and afterwards in the Guiteau case, in neither of which does the present question appear to have been raised.

This objection was raised on a motion in arrest of judgment, as well as on the motion to quash.

The defendant was arraigned on the 15th of February, and the trial set down for the 7th of March. On the latter day a motion was made for a postponement of the trial, principally on the ground that the prisoner's counsel had not had time to prepare for the defence, and had encountered certain difficulties in collecting the information necessary therefor, and because there existed in the public mind a feeling of hostility towards the prisoner that would strongly tend to prevent him from having a fair trial at that time. The motion was overruled and an exception reserved.

The defendant was not called upon to make his defence until the 19th of March, and the trial was not closed by a verdict until April 9th.

A motion of this kind is necessarily addressed to the sound discretion of the court, and it is extremely difficult for a reviewing court to determine when that discretion has been so abused as to amount to error.

The application of the defendant was very general in its averments. It did not show the impossibility of procuring any testimony at that time which was known to defendant; it complained rather of a want of time to search for testimony. In fact, all the witnesses who could be expected to know anything of the facts were to be found within a very narrow circle, and whatever might be the aspect of the case at that time, it is sufficient now to say that the record of the trial shows that the defendant had no difficulty in procuring all the testimony that was available for him and, in that respect, did not suffer from the action of the court.

As to the condition of the public mind towards the prisoner, no special showing was made, nor had the court any reason to suppose that more prejudice existed than in all cases in which a great crime is thought to have been com-

mitted. If the application could have been granted as prayed, *i. e.*, "for such time as will be reasonably sufficient to allow the prejudice to be allayed," it would have involved an indefinite postponement of the trial.

While the prisoner is not to be hurried to conviction to satisfy public clamor, it must be remembered, at the same time, that the public interest requires prompt investigation and punishment of crime. The record does not make any showing of such public clamor, in reference to the present case, and unless the court can see that under such influence the jury has been hurried into an unjust verdict, no case is presented for a new trial on this ground. Wharton's Crim. Plead. & Prac., Secs. 598, 601 and 689, and cases cited.

We cannot discover in the action of the court on this motion any ground for reversal.

Perhaps the most important question involved in the case relates to the qualifications of the jurors summoned and the prisoner's right of challenge.

The defendant challenged, for principal cause, a number of jurors who were summoned and examined on their *voir dire*, on the ground that they had formed and expressed an opinion as to his guilt or innocence, and in each case where his challenge was overruled, reserved an exception. He complains that at least two jurors who were thus challenged and were legally incompetent, and certainly objectionable to him, remained on the panel, and that he was unable to remove them, or others whom he might have been rid of, because he had exhausted his twenty peremptory challenges and had been compelled to use a large proportion of them in getting rid of jurors who ought to have been adjudged incompetent.

After a careful examination of this subject, we are all agreed that if a juror is erroneously adjudged competent over the challenge of defendant for cause, and the defendant is compelled to challenge him peremptorily in order to exclude him from the panel, and when the jury is completed and ready to be sworn, he has exhausted his peremptory

challenges, the error is an injury to him, and is ground for reversal of the judgment against him. If he still has peremptory challenges which he does not choose to make use of, he has no ground of complaint. Of course, an error in overruling a challenge for principal cause, of a juror who is actually sworn on the panel, is necessarily ground for reversal.

This general doctrine is stated in *People vs. Casey*, 96 N. Y., 116. It is assumed in *Burt vs. Panjaud*, 99 U. S., 180, and in the case of *U. S. vs. Neverson*, 1 Mackey, 176.

The same rule is asserted in *Hopt vs. Utah*, 120 U. S., 430. The court say: "Notwithstanding the peremptory challenges made by the defendant to two of the jurors, he had several such challenges which had not been used, when the jury was completed. If, therefore, the ruling of the court in disallowing the challenges to the two for bias, actual or implied, was erroneous, no injury to the defendant followed. Those jurors were not on the jury, and impartial and competent jurors were obtained in their place, to whom no objection was made."

We have procured the record and briefs in this case, and find an explanation of this language in the fact that when the jury was sworn, the defendant had still four peremptory challenges which he had not chosen to make use of; and in the brief of the counsel for the government of Utah, the prisoner's objections to three of the jurors for cause, whom he had peremptorily challenged, were met with the answer that if the court had sustained his challenges, the only difference would have been, that he would have had seven, instead of four, useless peremptory challenges.

The same rule is recognized in *Spies vs. Illinois*, 123 U. S., 168, but through a strange oversight it seems to be misapplied to that case. See the same rule asserted in *Wharton's Crim. Plead. & Practice*, Secs. 693-695.

And it may be added that in all the cases where it is said that an error in overruling a challenge for cause, followed by a peremptory challenge, does no injury to the defendant,

the statement is qualified by the condition that he still has peremptory challenges left, when the jury are sworn.

In this case the defendant had exhausted his peremptory challenges before the jury was completed, and we are therefore compelled to review the rulings of the trial justice on the challenges for cause, both to the jurors who are sworn and to those who were adjudged competent against the challenges for cause, by defendant, and afterwards by him peremptorily challenged.

And this brings us to consider the question under what circumstances the previous formation and expression of an opinion as to the guilt or innocence of the accused disqualifies a person from serving as a petit juror on his trial.

The Federal and State constitutions guarantee to an accused the right to be tried, not by a jury who have formed no opinions, but by an *impartial* jury.

By the old common law, the formation of a previous opinion did not disqualify one from serving as a juror unless it indicated malice or prejudice against the accused. But from a very early period, in this country, that a juror had formed an opinion as to the issue to be tried was held good ground for a challenge for principal cause. The courts, however, were not agreed as to the character of the opinion, or the source whence derived, which should give it that effect.

Chief Justice Marshall, in Burr's Case, said that "light impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror, but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which combat that testimony and resist its force, do constitute a sufficient objection to him."

It is now conceded, on all hands, that if the opinion or impression of the juror is derived from mere rumor or newspaper accounts of a transaction, and is merely hypothetical

or conditional, the juror tacitly discounting these reports and mentally allowing for exaggerations and mistakes, and being free from any actual prejudice or bias against the accused, the opinion is no obstacle to his competency.

On the other hand, many authorities hold that if the opinion is a fixed and decided one, it is a disqualification. 36 Amer. Dec., 521 et seq. But here again, what shall be deemed a fixed and decided opinion, and what shall be sufficient evidence of it, are questions which it is not so easy to answer.

In every capital case, each juror, on his *voir dire*, is plied with questions by the prisoner's counsel, whether he has formed an opinion—whether it is a decided one and will require evidence to remove it, and strong evidence—and can be generally led to answer all these leading questions in the affirmative, partly from a willingness to escape jury service and partly from want of appreciation of the terms employed. It seems to me not unlikely that this practice, which is calculated to retard and embarrass trials, has led to the passage of laws in a number of the States, of which that of Illinois, cited in *Spies vs. Illinois*, 123 U. S., is a sample, providing, in substance, that in the trial of criminal cases, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or newspaper statements, shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence, and the court shall be satisfied of the truth of the statement.

The philosophy of this legislation seems to be, that while the constitution guarantees an impartial jury, it is competent for the legislature to provide a rule of evidence as to such impartiality. Especially should this be so when we consider how vague and indefinite are the terms by which the opinions of jurors are characterized, and how the decisions of the courts have failed to furnish any certain and universally accepted rule on this subject. See *Stokes vs. People*, 53 N. Y., 164.

In the case of *Cooper vs. State of Ohio*, 16 Ohio St., 328, the court on this subject, said:

"As to the character of opinions, the existence or expression of which should be regarded as sufficient evidence of the disqualification of a juror, the practice of the courts has not been uniform. All agree that he should be impartial. The diversity has been as to the rules of evidence that should be observed in practice, in ascertaining the required fact. The statute in question does not require or authorize the admission into the jury of a partial or prejudiced juror. It only permits the courts to accept the persons to whom it applies, as jurors, after being satisfied, from all the evidence disclosed, that they will render an impartial verdict upon the law and the evidence—in other words, that they have the qualifications which the constitution requires jurors to possess. The constitution does not prescribe rules of evidence; it only requires the fact of the impartiality of the juror to exist; and a statute cannot be said to contravene its guaranty, which leaves the judicial mind free to find the fact, from the evidence submitted, according to the truth. The statute merely prescribes, as a rule of evidence, that opinions formed, or formed and expressed, founded upon newspaper statements or reports, or rumor or hearsay, and not upon conversation with witnesses of the transaction, or hearing them testify, shall not be conclusive evidence of the incompetency of the juror, and thus render all further inquiry unnecessary and unavailing. Nor is the opinion of the juror that he will be able to render an impartial verdict to be regarded, under the statute, as conclusive of competency. It is only a circumstance for the consideration of the court in connection with the nature of the opinion, and of the information upon which it may be founded, and all other matters elicited on the examination, throwing light upon the question as to the impartiality of the juror. If, from the investigation, the court is satisfied that the character of the opinion is such that it will not interfere with the juror's rendering an impartial verdict, it is authorized to

admit him to the jury; but if not satisfied, he is to be rejected.

"The design of the statute was to obviate the difficulty, experienced in practice, in obtaining jurors, in criminal cases, from the better informed class of citizens. Crimes, especially of the graver description, are more likely than ordinary current events to become notorious in communities where they are committed. And the more intelligent and better informed the community, the more extended this notoriety becomes. The general extension of education in the community, and the multiplied and constantly increasing facilities afforded by the press and other means for the general dissemination of current events among the people, render the rule of evidence prescribed by the statute, in the class of cases to which it applies, necessary and wise, and, in our opinion, leaves the constitutional rights of the accused unimpaired."

But apart from this legislation, the trend of judicial thought is in the same direction. As far back as *Wormley's Case*, 10 Grattan, 687, decided in 1852, Judge Daniel said:

"It is well settled that the question as to the competency of a juror is to be tested by the character and force of the opinion which he has formed, and not by the occasion on which the opinion was formed or the source from which the information of the juror may have been derived. Still, as it is natural to expect that the impression or opinion of the juror would be stronger or weaker as the information or evidence on which it is formed is more or less full and authentic, it often becomes necessary, when doubt is felt, from his statements, to look to his source of information, as a very important circumstance in explanation of this doubt. If, upon the whole examination, it appears that the opinion is decided and substantial, the juror is incompetent, and, on the other hand, if the opinion appears to be merely hypothetical and so slight that it would in all probability readily yield to evidence, his competency is established."

I cite this to show that even at that time the juror's competency was to be determined, not by himself, by any declaration, however positive, but by the court, upon his whole examination, considering the source of his opinion and determining its strength from all the circumstances.

Without multiplying references to State decisions, I refer to one or two later cases. The first one is the case of *Clark vs. Commonwealth*, 123 Penn. St., 555, decided in 1888. In that case it appears that at the trial a juror stated that he had read the report of the coroner's inquest in the paper, and had formed a fixed opinion with reference to the guilt or innocence of the accused; that it had been deliberately formed and was still entertained; that it would take strong evidence to remove that belief. He further said his opinion was subject to the evidence, and that he could make his verdict wholly from the evidence.

Another juror said that, from what he had read and heard, he had formed and expressed a fixed and determined opinion, made after deliberation, and had heard nothing to change it. Then again, "I certainly formed that after I read the accounts. Q. A fixed and determined opinion? A. Until I hear something further to contradict it. Q. Then you would have to have such evidence as a juror as would remove a fixed and determined opinion before you would change your mind. A. I would have to have some truth of it. Q. You have made up your mind? A. So far as I have heard and read reports."

Another juror: That the evidence would have to be strong to induce him to change his opinion; that he lived about five miles from the scene of the crime. "Q. You say you still have an opinion on this subject? A. Yes, sir, I have an opinion. Q. When you would go into the jury-box you would already have formed an opinion—you have an opinion now? A. Yes, sir. Q. And you will hold on to that until there is enough evidence to change your mind? A. Yes, sir."

All these jurors were challenged for cause. The court, McCollom, Justice, said:

"The four assignments of error which relate to the action of the court below on defendant's challenge of jurors for cause, involve the question whether the jurors so challenged had such opinions of the guilt of the accused as rendered them, under the decisions of this court, incompetent to serve. As a fixed opinion denies to evidence its proper effect, and prevents an impartial trial, it is a disqualification of the juror. Whether the juror has such an opinion is to be determined upon evidence, and the usual and proper practice is to examine him on his *voir dire* as to the opinion he has formed. If from the evidence elicited by such examination it is found that he has a fixed opinion, the challenge is sustained; if it is not so found, the challenge is overruled. The disposition of the challenge depends on the finding of a fact, and in passing upon such finding here, we must consider the evidence as a whole and remember that the examination was in the presence and under the direction of the court below, and that it had better opportunity to discover the nature and character of the opinion held by the juror than is afforded this court in review.

"A juror in the course of his *voir dire* examination, and in response to some question addressed to him, may say that he has a fixed opinion, while his answers, taken together, may satisfactorily show that this is a misdescription of the opinion he holds. An isolated answer is not decisive of the question under investigation, but it must be determined upon the whole evidence affecting it. A careful study of the evidence of jurors Riggle, White, South and Dulaney, has failed to convince us that either of them had a disqualifying opinion. We think that under the decisions of this court in *Staup vs. Commonwealth*, and previous cases, they were competent jurors. The assignments which relate to the qualification of jurors are not sustained."

I think it proper also to read a brief extract from the case of *O'Meara vs. Commonwealth*, 75 Penn. St., 428. There the juror had formed an opinion; and he thought that opinion would follow him to the jury box if he had no evi-

dence against it and would influence him if he had no other evidence. But he said further that he would follow the evidence, and the opinion would not influence his judgment. The court said:

"This case presents a test of the principle laid down in *Staup vs. Commonwealth*, and we must either recede, and go back to the practice of an age when ignorance of passing events constituted a characteristic of the times, and exclude every juror who had formed any opinion, even the slightest; or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those only whose opinions are so fixed as to be prejudgments, or have been formed upon the known evidence in the cause. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the most important causes in life to those so ignorant that their dark minds have never been smitten by the rays of intelligence."

In the case of *Blackman vs. State of Georgia*, which was decided in 1888, a juror had declared: "I believe he, the defendant, is guilty because two juries have found him guilty." In that case, too, the question arose whether it is competent for the legislature to prescribe the rules of evidence to procure an impartial jury. The court said:

"A juror is not disqualified by a loose and vague opinion as to guilt or innocence, unless it has been generated by seeing the crime committed or hearing the evidence on oath; and such was not the origin of the opinion expressed by this juror. It is natural and proper for every citizen to have some opinion in favor of the correctness of the verdicts of juries; and if following out so general and innocent a law of the human mind is to disqualify all the citizens, we see not how a man could be tried a second time for the same offence if the jurors put upon him had heard of his previous conviction. The belief entertained and expressed by the juror was apparently altogether intellectual, wholly free from any admixture or complication with the emotions or passions."

But the most important expression of opinion on this subject is that of the Supreme Court of the United States in the case of *Spies vs. Illinois*.

In that case a petition was addressed to Mr. Justice Harlan, and by him referred to the full court, for a writ of error to the Supreme Court of Illinois, upon the ground that the statute of that State, as interpreted by its courts, had denied to the petitioners the right to an impartial jury, guaranteed to them by the constitution of Illinois, and also by the constitution of the United States, by virtue of the Fourteenth Amendment.

It set forth the statute before mentioned, and averred that the criminal court of Cook county held that said statute controlled as to the qualification of jurors, and that under this statute a man was a qualified juror and not subject to challenge for cause on account of prejudice or partiality, notwithstanding any opinion formed and expressed by him touching the guilt or innocence of the accused, which opinion was based on what he had heard and read touching the matter inquired of, and, notwithstanding the proposed juror stated that he still entertained the opinion that the defendants, or some of them, were guilty as charged, or upon the question of their guilt, and that he still believed to be true the accounts heard and read by him; and that his opinion was so fixed that it would require evidence and even strong evidence to change that opinion; provided only the juror would state that he did not know that he had expressed any opinion as to the truth of the reports and believed he could render a fair and impartial verdict upon the evidence. It further averred that the ruling of the Cook county court had been sustained by the Supreme Court of Illinois.

The petition raised the direct question whether a juror who avowed an opinion formed from what he had read and heard, so fixed that it would require strong evidence to remove it, was such an impartial juror as the constitution entitled the accused to, even where he stated that he could render a fair and impartial verdict in the case according to the law and evidence. The Supreme Court say:

"At the trial the court construed the statute to mean that 'although a person called as a jurymen may have formed an opinion based upon rumor or newspaper statements, but has expressed no opinion as to the truth of the newspaper statements, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. It is not a test question whether the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether the verdict will be based only upon the account which may be given here by witnesses under oath.'

"Interpreted in this way, the statute is not materially different from that of the Territory of Utah, which we had under consideration in *Hopt vs. Utah*, and to which we then gave effect. As that was a territorial statute passed by a territorial legislature for the government of a territory over which the United States had exclusive jurisdiction, it came directly within the operation of Article VI. of the amendments, which guaranteed to *Hopt* a trial by an impartial jury. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded, both in the territorial courts and here, as furnishing the proper rule to be observed by a territorial court in empanelling an impartial jury in a criminal case."

And then, after referring to several State decisions sustaining the constitutionality of similar statutes, the court say:

"Without pursuing the subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case, that the statute on its face, as construed by the trial court, is not repugnant to Par. 9 of Art. 2 of the constitution of that State, which guarantees to the accused party in every criminal prosecution, 'a speedy trial by an impartial jury,' &c., &c. As this is substantially the provision of the Constitution of the United States, on which the petitioners now rely, it follows that even if their position

as to the operation and effect of that constitution is correct, the statute is not open to the objection which is made against it."

We have no such statute in this District, but we have the constitutional guarantee of an impartial jury, and the application of the decisions in *Hopt vs. Utah*, and *Spies vs. Illinois*, is that they enlighten us as to the meaning of those terms.

The statute of Illinois declared the competency of the juror, although he had formed an opinion based upon rumor or newspaper report, about the truth of which he had expressed no opinion.

The Utah statute declares him competent, though he has both formed and expressed an opinion.

The Supreme Court of the United States held both statutes consistent with the constitution.

The Supreme Court, by approval of the legislation referred to, as constitutional, substantially decides that a juror will come within the requirement of impartiality, although he may have formed and expressed opinions based upon rumor or newspaper accounts, and although he may require evidence to change his opinion, if notwithstanding this, he can, in his own opinion and in the judgment of the court, render an impartial verdict, according to the law and the evidence. In line with this, is the case of *Garlitz vs. The State*, 71 Md., 293. Moreover, as the statutes referred to speak of opinions generally, they make no discrimination between such as are called fixed or decided ones and any others.

We feel it our duty to follow the lead of the Supreme Court on this subject, in the direction of settling the law on this vague and vexed question of the competency of jurors, on which no well defined and settled rule has obtained in this District.

Again, in the case of *Reynolds vs. United States*, 98 U. S., 145, the Supreme Court say:

"In these days of newspaper enterprise and universal

education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. . . It must be made plainly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court."

Cases can well be conceived of in which the ruling of the trial justice should be reversed. If, for example, a juror should avow a decided prejudice against the accused and an opinion which no evidence could remove, and declare his inability to hear the evidence impartially, and there should be no other statements in relief of these, it would be error to adjudge him competent.

And so, if he has attended a former trial, or, perhaps, if he has read authentic accounts of it, with all the evidence on both sides, and has formed definite conclusions from it, he ought to be excluded. Here, however, a distinction should be taken between this case and the mere newspaper reports of preliminary inquiries, as at coroners' inquests, where every one knows that the testimony is one-sided and partial. This distinction is recognized by the Supreme Court of Pennsylvania in the case of *Allison vs. Commonwealth*, 99 Pa. St., 32.

But between the state of conviction arrived at in one of the two ways above mentioned, and a condition of absolute vacuity of thought, lies a field which is to be covered by the sound judgment and discretion of the trial justice. We hold that the declaration of one called as a juror that he has a decided opinion and one that requires evidence and even strong evidence to remove it, is entirely inconclusive as to his competency. Neither is his belief that he can hear and decide impartially. If the court should believe that he has a rooted conviction of the prisoner's guilt, the latter declaration would not relieve his incompetency, and so a number of the cited cases hold. But, on the other hand, the very declaration of this belief, if sincere, raises a doubt as to the question of his decided opinion. The two statements qualify each other and are to be taken together, and the court is to judge from the whole examination which is more likely to be correct. It is hardly necessary to say that the trial justice has the advantage of a reviewing court in this inquiry. He judges from not only the words of the juror, but his demeanor, and perhaps from his personal knowledge of his character—all sources of opinion which cannot be conveyed in the record.

When we come to examine the question of the sufficiency of the challenges for principal cause, we find that only two jurors so challenged were actually sworn on the panel. One of them, Robert Gray, when first interrogated, had no opinion; then, under the leading of the defendant's counsel, he had formed an opinion; then he had now no particular opinion; then he had an opinion which it would take pretty strong evidence to remove, and finally, he declared that he could hear the evidence and render an impartial verdict in accordance with it. In view of this vacillation, the trial court could hardly be in error for ruling that the juror had no such fixed and settled opinion as to disqualify him.

The second juror, Lewis, like many of the other jurors, had formed an opinion from the accounts published in the papers, strong and decided, which would require strong evi-

dence to remove, but, after all, could listen to the evidence and return a verdict based upon it, entirely regardless of the opinion based upon what he had read.

Now, it is impossible for us to say that the court manifestly erred in this, for the juror may have given such evidences of moderation and fairness as to make his last statement entirely trustworthy.

The next inquiry would be as to the jurors who were challenged peremptorily after being adjudged competent over the challenge for principal cause. And in reference to these, it may be said that although an improper ruling as to their competency is recognized as an injury, under the circumstances of this case, it is a theoretical and technical one only, and the court, at least, should not be astute to find errors in the disposition of a question so vague and so necessarily committed to the sound discretion of the trial court.

The strongest case of this class is that of Charles W. Morris. Like the others, he disavowed any bias or prejudice against the prisoner, but had formed an opinion from what he had read in the newspapers, including the proceedings at the coroner's inquest. To the inquiry whether he could bring in a verdict based wholly on the law and evidence, he replied, "No, sir, I don't know that I could." But afterwards he said that his opinion would yield to evidence if it was clear and positive; and when again asked whether he could render a verdict according to the law and the evidence, he replied, "That is the only thing we have got to be governed by." The principal difference between him and the other jurors was that he expressed a doubt of his ability to render a verdict according to the evidence. But to the trial justice, observing his demeanor, this may have rightly appeared to be a mistrust of himself, proceeding from a sensitive conscience, which would be his best equipment for the service required of him, and his declaration that there was nothing else but the law and evidence to be guided by, may have seemed, as it might to us, a sincere recognition of duty.

It is impossible for us to say that there was a manifest mistake in accepting him as competent. If there is a doubt as to such error, we have no right to overrule the decision.

If this is proper to be said of this juror, it applies with more force to the others of this class. They all disavow prejudice, have opinions derived from the same unauthentic source, and unlike Morris, profess themselves able to render a verdict according to evidence. An evidence that the trial justice exercised considerable care in this examination is supplied by the fact that he, of his own motion, rejected some twenty odd persons called to be sworn, because in his judgment they had decidedly prejudged the case.

We are, therefore, unable to discover that there was any such manifest error in the selection and empanelling of the jurors as would justify us in a reversal of the judgment.

Before leaving the subject, it will be proper to notice the motion made to arrest the trial and discharge the jury on the ground that two of the jurors had, before the trial, used hostile expressions in reference to the prisoner. It is sufficient to say that the counter affidavits filed sufficiently disposed of that question. And we may refer to a decision reported in *United States vs. Upham*, 2 Mont., 170, which holds that an affidavit charging a juror in a murder case with having expressed an opinion which disqualified him from serving, is offset by an explicit denial by the juror under oath.

Another question relates to the declarations of Mrs. Schneider and her sister, Jennie Hamlink, made immediately after the shooting, which were offered in evidence as parts of the *res gestae*.

The case of *Insurance Company vs. Mosley*, 8 Wall., 397, has settled the law, for us, that the declarations of an injured party, made immediately after the injury was inflicted, may be received not only to show the nature of it, but also to show the cause. And this is decisive as to Mrs. Schneider's exclamation, made even before she fell, that Howard Schneider had shot her brother and herself.

Other authorities extend the rule still further, so as to embrace the statements of third persons, especially where such statements are the immediate concomitant and result of the principal fact. Thus, in *State vs. Walker*, 78 Mo., 380, the exclamation of a bystander, addressed to one of the parties to an assault, "Don't strike, you have shot him now," was admitted.

So, in *Newton vs. Insurance Company*, 2 Dillon, 154, the declarations of a third person that the deceased had shot himself, made immediately after the shooting, was admitted.

So, immediately after a robbery, the description of the robbers by the wife of the party injured, was received. *Jordan's Case*, 25 Grattan, 943. In this case the wife testified on the stand, notwithstanding which, her statement immediately after the robbery was also received.

The court said:

"The wife of the prosecutor did describe to the jury the appearance and dress of the persons engaged in the attempted robbery. . . . But the Commonwealth was not necessarily restricted to this mode of examination. The description of the prisoners, given a few minutes after the occurrence, was more likely to be correct than any given on a subsequent occasion. On the trial, the wife of the prosecutor might fail to remember many particulars or details observed and remembered at the time of the robbery. Her description given to the witness a few minutes afterwards was a part of the *res gestae*."

In fact, the spontaneous exclamations of bystanders, witnessing a tragedy, are as much the natural result and incident of it as those of the participants.

This applies with special force in the present case to Miss Jennie Hamlink, whose declaration was to the same effect as her sister's. She was one of the very group in which the double homicide was committed, the sister of both the parties killed. The shock to herself was only less than that of her sister. Her outburst of grief over the bodies still before her, her cries and exclamations to those around her inquir-

ing the cause, would certainly appear as much a part of the main fact—a natural and necessary concomitant and incident of it as anything that could be said by another person than the one fatally wounded.

The principle once recognized, as it seems to be, that the statements of third persons may, under some circumstances, be received as part of the *res gestae*, her case must be admitted to be as strong a one for the application of it as can be conceived of. The evidence as to her exclamations was first brought out in her own examination as a witness in this case, so that an opportunity was afforded to test their value by cross-examination.

A very important question relates to the admission of alleged dying declarations by Mrs. Schneider.

The authorities are not entirely harmonious on this subject, some of them laying down much stricter rules than the others.

The dying declarations of the party alleged to be murdered are generally admitted from the necessity of the case, against the party accused of the homicide, in relation to the immediate act and the circumstances under which it was committed, because the declarant is most likely to know the truth, and because otherwise his testimony must be lost, and because declarations made at such a time are supposed to be made under as strong a sanction and guaranty of truth as if he were under oath and on the witness stand.

It is conceded that such declarations are inadmissible unless made under a sense of impending death. As long as a lingering hope of recovery remains, they are entitled to no weight, and must be excluded.

Neither would it be sufficient that the declarant despaired of *ultimate* recovery, because that is consistent with the hope of indefinite continuance of life. But exactly how immediate must be the expectation of death, the authorities do not seem agreed or clear. Some would seem to confine the rule of admissibility to those made at the very point of death.

The weight of authority, however, does not seem to re-

quire so strict a rule, but to justify the admissions if the declarant does not expect to survive the injury from which he actually dies, and the injury is such that it must be expected to result *speedily* in death. In the case of Thomas John, referred to in 1 East's Crown Law, 357, 358, it was said by all the judges to whom it was referred, "And if a dying person either declares that he knows his danger, or it is reasonably to be inferred from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence."

And the state of mind of the deceased need not be proved exclusively by his expressions, but may be gathered from the circumstances of his condition. Wharton's Crim. Ev., Secs. 282-286.

So, in *McLean vs. State*, 16 Ala. N. S., 672, it was held that the declarations of the deceased should be admitted in evidence, though he does not, at the time, state that he is conscious of impending death, if made under such circumstances as in the judgment of the court will reasonably warrant such an inference.

And in 1 Greenleaf, Sec. 558, it is said:

"It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger or the opinions of the medical attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind."

The deceased had received three pistol balls in her body on Sunday evening, and had undergone a severe operation, which failed to reach one of the balls; she was suffering excruciating pain, and on Monday morning she begged for

water, saying to her father and mother and the physician that she could not live, she could be with them but a short time anyhow, and why not gratify her with a drink of cold water. And the night before she said to the professional nurse, several times, that she knew she could not recover, and once said, "Why didn't he kill me outright; I am in torture." She also talked on Monday as to the disposition she wished made of her things.

All this seems to indicate a belief that she would not survive the injury, and that death was approaching.

On Tuesday, she said she realized that she could not live and she was able to make her statement. Mr. Clagett asked her if she thought she was going to die, to which she answered "yes." He further read over to her the formal heading, containing the statement of having abandoned all hope of recovery, and being in the face, as she believed, of impending death, and inquired if that was so; to which she assented. On the next day she expressed a desire that her husband might see her body after her death, that it might be the cause of reforming him, after repeating the request for water, and the declaration that she could live but a short time. In fact, there is nothing to show any change, at this time, in her state of mind, from what it was the day before when her formal written statement was made.

We think, upon this showing, that her *ante mortem* statements were admissible and the exceptions to their admission must be overruled. A part of her last statement, made on Wednesday, was objected to as argument. She was told that her husband claimed to have acted in self-defence, and that Frank Hamlink had shot at him. She said it was absurd—that Frank had no revolver and did no shooting. We see no reasoning in this, but simply an emphatic denial of her husband's statements.

That part of the charge relating to dying declarations, and which is given in place of the tenth instruction asked by the defence, is criticised because it is said to give more weight to a dying declaration than to the testimony of a

living witness. We do not so understand it. In speaking of the objection to the admission of statements which could not be subjected to the test of cross-examination, the judge simply said that the objection and disadvantage are overcome by the necessity of the case; in other words, the objection must yield to the necessity of the case.

A number of the exceptions group themselves around the question of self-defence; not, of course, self-defence against Mrs. Schneider, but against a third person, her brother Frank Hamlink; and the question naturally arises, how far the theory of self-defence finds a place in the case.

If Frank Hamlink fired the first shot at the defendant, as the latter claims, this, of course, would not of itself exonerate the defendant from the charge of killing his wife. Until the contrary is shown, the killing would be presumed malicious. The defendant's first step in his defence would be to show that the killing was accidental and unintentional. Even this would not complete his case, for if he was unlawfully shooting at Frank Hamlink, and, in doing so, unintentionally and accidentally killed his own wife, it would be as much murder of the wife as if she were the intended victim.

It would be necessary, therefore, for him to show that he was acting lawfully in firing at Frank Hamlink, which he could only do by showing that the latter had made a deadly assault upon him, and that the shooting of Hamlink was necessary to preserve his own life or protect him from great bodily harm. This he would unquestionably have the right to do, but this right depends upon the assumption that the shooting of the wife was accidental.

And it is important to determine what is the drift or result of the evidence as to this question.

The evidence for the government tended to show that the defendant, directly facing his wife, and holding her right arm or hand with his left, fired three bullets into her body, all of which entered her body, in front, and passed towards the back and that, changing his position, he then shot her

brother. A fifth bullet, whether aimed at Mrs. Schneider or at her brother, is said to have gone through the window of an adjacent house.

In order to meet this evidence, which included the surgeon's testimony as to the direction of the bullets, the defendant testified that Frank Hamlink commenced the firing at him; that after the first shot, his wife, who had been facing himself, turned so as to face her brother, her left side being slightly inclined towards himself; that when the defendant drew his pistol, and while he was returning Frank's fire, his wife was at his right, rather back of his elbow, facing her brother. In order to corroborate his statement, a large part of the evidence for the defence was introduced to show that more than the five shots of the defendant's pistol were fired, and that Frank Hamlink therefore must have fired some of them. It was also attempted to show that the first shot came from the direction where he stood.

This evidence was evidently intended to convey the impression, as it did indeed tend to prove, that Mrs. Schneider was killed by her brother.

In all the evidence offered by the government, we can see nothing from which it could rationally be inferred that the shooting of Mrs. Schneider, if by the defendant, was accidental. If a man is shown to have fired three shots into another person, at close quarters, from which death results, the act is presumed to be intentional and malicious, even without any direct proof of motive, malice express, or premeditation, and no inference that it was accidental could be justified by the mere conjecture that it might, by possibility, have been accidental, or by the general presumption of innocence. Still less would this be the case where the proof is supplemented by evidence of actual bad feeling on the part of the slayer. The burden would be upon him of disproving the killing, or of showing that it was through misadventure or in self-defence against the deceased.

The tendency of the defendant's own testimony is only to show that he did not shoot his wife, either accidentally or

intentionally, but that she was accidentally killed by her brother. And nowhere else in the testimony for the defence do we find anything which throws any light on the particular question of Mrs. Schneider's position at the time of the firing and the possibility of an accidental shooting by the defendant.

The question, then, on the proof, seems to be between two entirely contradictory accounts, the one showing an intentional shooting by Schneider, and the other an accidental shooting by Frank Hamlink.

There seems to be no room for the immediate theory of an accidental killing by the defendant. It is not, indeed, his theory, but that of his ingenious counsel. It is either mere conjecture that, in the alleged cross-firing between Frank Hamlink and the defendant, Mrs. Schneider may have received the bullets of the latter accidentally, or else it is made out by assuming half the evidence on each side to be true, and half to be false. It assumes, for example, the defendant's statements that Mrs. Schneider was facing her brother while *the latter* was firing, and was at the defendant's right side while *he* was firing, to be untrue, and the evidence of the government as to her position to be true; and, on the other hand, it assumes the government's evidence that Frank Hamlink did not fire at all, to be untrue, and the defendant's to the contrary, to be true. And by placing together parts of the evidence in this way, this theory would place Mrs. Schneider in such a position that she might, by possibility, have received the defendant's fire in front. Even then, it would be difficult to see how the proof of accidental shooting is completed; and it seems to us that, however plausible, this theory finds no support in the proof, and that the jury had no other choice than to find either an intentional killing of Mrs. Schneider by the defendant or an accidental killing of her by her brother.

If Mrs. Schneider was killed by her brother, the defendant could not be found guilty. Her brother, if he had survived, would have been accountable for it, unless he had

shown it to be from misadventure, while he was doing something lawful, as, for instance, defending himself against the accused.

It might be true that Frank Hamlink commenced the shooting, and yet equally true that the defendant intentionally shot both his wife and Frank Hamlink.

If the defendant killed his wife intentionally, it is wholly immaterial whether or not he had first been assailed by her brother, and whether or not it was necessary to shoot her brother, in defence of his own life. Whether he shot her with premeditation, or under a sudden impulse of anger, but without provocation from her, or in resentment for Frank Hamlink's interference between them, or in revenge for being fired at first by Frank Hamlink, if such was the case, it would equally be murder of the wife.

In either view, the question of self-defence, as against Frank Hamlink, is foreign to the case. And this conclusion disposes of all exceptions to the exclusion of evidence and the refusal or modification of instructions and the language of the charge on this subject. We could not have found fault with the court if the jury had been told directly that there was no evidence from which they could justly infer an accidental shooting by the defendant.

The view we have announced disposes of the question of admitting evidence to show previous threats against the prisoner by Frank Hamlink. (See p. 242, record.)

This evidence was offered to show that the defendant had reasonable ground to believe that his life was in danger from his brother-in-law, and that he was justified in shooting in self-defence.

In this connection, reference may be made to a subject of very earnest complaint on behalf of the defendant, in connection with the testimony of Marion Appleby. He was in company with the defendant on the south side of Q street at the moment when the latter crossed over to speak to his wife, and witnessed the shooting. He was produced on

behalf of the defendant, and was asked as to what Frank Hamlink had said about the defendant on a certain occasion, the object evidently being to show either threats or hostile expressions. This was ruled out. On cross-examination, Appleby said that he may have admitted in the District Attorney's office that the reason why he did not go over with Schneider across the street, was because he thought there might be trouble. Now, it is complained that Appleby was not allowed, in response to an inquiry by defendant's counsel, to explain why he thought there might be trouble, and the jury were left to infer that his apprehension was caused by something communicated to him by Schneider, from all which they might also infer premeditation on the defendant's part, and, moreover, the judge, in his charge, called attention to this avowal of Appleby, which he had not been allowed to explain. If the case was as thus represented, there was error. If Appleby had been asked the direct question whether his fear of trouble was caused by anything told him by Schneider, it would have been error to refuse to allow him to answer. But instead of that, the defendant's counsel asked him the leading question whether he had heard anything from Frank Hamlink, or seen anything in his conduct that led him to believe there might be trouble. This was precisely what had been previously ruled out because the court thought there had not yet been laid any foundation for it, it being intended to lead up to the proof of self-defence. When it was first offered, counsel did not state the object of this evidence (p. 196), but afterwards it was made very plain, when Appleby was recalled for the defence, for the avowed purpose of showing threats by Frank Hamlink against the defendant in order to establish the theory of self-defence (pp. 242, 243).

If, as we think is the case, the fact of accidental killing must be shown in order to make the fact that the prisoner was defending himself against Frank Hamlink, available for him in the defence of this case, it can hardly be gainsaid

that, at least at that stage of the trial, when the evidence as to threats was offered, no foundation had been laid for introducing that evidence, and the court was justified, for that reason, in excluding it.

The fact then remained that Appleby apprehended trouble, without explanation, and this without the fault of the court.

The defence offered to show by one J. B. Thomas (p. 189, Rec.) that Frank Hamlink, about November 26, before the shooting, was the owner of a pistol like that found near his person after he was shot. The court held it to be too remote. The reason assigned for excluding the evidence may not have been a good one, but the error, if it was one, was fully cured, because the same witness, being afterwards called by the United States, testified to all that he knew on the subject on which the defendant's counsel had interrogated him (p. 275). Independently of this, however, this evidence falls within the rule before announced as to all the evidence on the subject of self-defence.

The same may be said of the sur-rebutting evidence offered by the defence in reference to the bullet holes in the clothing of the defendant. We consider the evidence of experiments made during the trial to be objectionable in itself; but independently of that, the evidence and the exceptions to its exclusion share the fate of the whole theory of self-defence.

Exceptions were taken to the refusal of the court to allow witnesses to give their opinions as to the number of pistols that were fired.

We think the justice was properly careful in attempting to confine the witnesses to facts and exclude their inferences, which could just as well be drawn by the jury.

One Malone was allowed to state that he thought he heard seven shots; saw the flashes, and the first flash seemed to be going towards the street and the last to be shot into the sidewalk.

It is evident that the jury were as able, as this witness, to

form a conclusion as to the number of pistols, and could not have been aided by that of the witnesses; and there was no error in excluding the latter as evidence.

And again, Mr. Lipscomb, who did not see the shooting, testified as to the number of shots and the rapidity with which they were delivered. It was his impression there were more than five shots. Surely his opinion as to the number of pistols in use could add nothing to his narration, and the jury were possessed of all the light he could give them, from which to draw a conclusion.

These are examples referred to in the brief as illustrating this head of objection to the court's rulings.

We do not think the authorities cited affect the question. As far as sounds are concerned, they simply go to the effect that their character and direction and the sources from which they proceed may be testified to by any witness. If the evidence offered here had been simply that the sounds were those of a pistol, and that they came from such a direction with reference to the position of the witness, they would have been within the principle of these rulings, and would probably not have been excluded.

But again, all this is only a part of the same theory of self-defence, which has already been commented on.

It is claimed that an important error was committed in allowing the witness, Mary Harris, to be examined on behalf of the United States, in rebuttal.

One Hannah Burgess, whose name was on the list of witnesses furnished to the prisoner, had testified in chief that she saw the defendant, immediately after the firing, drop or throw down a pistol, and run away.

After the defendant's evidence was closed, the District Attorney offered to prove substantially the same thing by one Mary Harris, with the statement that he had not known of this witness until after the testimony for the defence had been commenced. The evidence was objected to on the part of the defendant, first, because the name of the witness was not included in the list furnished to the prisoner, and

secondly, because the proposed testimony was not rebutting, but was properly testimony in chief.

The Revised Statutes of the United States, Sec. 1033, provide that when any one is indicted for a capital offence other than treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least two entire days before he is tried for the same."

In the case of *Logan vs. United States*, 144 U. S., 263, in which the court held that the statute was not complied with by simply furnishing a list of the witnesses who had testified before the grand jury, the court said:

"There is no occasion to consider how far, had the government delivered to the defendants, as required by the statute, lists of the witnesses to be produced for proving the indictment, particular witnesses, afterwards coming to the knowledge of the government, or becoming necessary by reason of unexpected developments at the trial, might be permitted on a special reason shown, and at the discretion of the court, to testify in the cause."

The court suggests this as, at least, an open question.

Now, we have no hesitation in expressing the opinion that the statute never was intended to preclude the United States from making use of any material testimony discovered during the progress of the trial, and all that it exacts of the prosecuting officer is that he shall, in good faith, furnish to the prisoner before the trial, the names of all the witnesses then known to him and intended to be used at the trial.

There was no error, we think, in overruling the objection to Mary Harris on the first ground mentioned.

The evidence was offered to rebut the defendant's testimony as to having carried his pistol away from the place of the homicide and thrown it down in the alley. There may be a doubt whether it was strictly rebutting evidence, but, still, it does not follow that there was error in admitting it, for the simple reason that the order of proof may be regu-

lated by the trial justice, in his sound discretion, and it is not only his right, but his duty, where, in his judgment, justice requires it, to admit evidence at any stage of the case, though the party has no strict right to offer it. And it has been repeatedly held, under this head, that he may admit evidence in criminal cases which is strictly evidence in chief, after the defendant's case is closed. See *Comm. vs. Blair*, 126 Mass., 140; *State vs. Alvord*, 21 Conn., 46; *Comm. vs. Meary*, 151 Mass., 55; *People vs. Maunsausau*, 61 Mich., 15. In the last case, which was an indictment for the larceny of a cutter, the court say:

"The respondents complain that this proof belonged to the primary case of the people; that it was a manifest injustice to them, as they could not get witnesses to meet it on the trial, and was not part of the rebuttal testimony.

We are not disposed to hold that it was not proper to be given in rebuttal, inasmuch as the defendants had denied having such a cutter; but, at any rate, it was in the discretion of the court to allow it."

And, in the case of *Commonwealth vs. Blair*, 126 Mass., 40, which was an indictment for procuring an abortion, after the defendant's case was closed, the government called another witness to prove that the defendant had in his possession an instrument adapted to the purpose of procuring abortions. The district attorney would not say that he had omitted this testimony from his case in chief unintentionally, but said he had been expecting to elicit the facts from the defendant on cross-examination. The evidence was, of course, excepted to, and yet the Supreme Court of Massachusetts said: "Its admission after the defendant had closed his case, was a matter of judicial discretion, and not a subject of exception."

In a case of such importance as the present, we should consider it eminently proper, at any stage of it, to admit important evidence for either party, and such the evidence of Mary Harris evidently was.

Another item of rebutting evidence is to be considered in

connection with the cross-examination of defendant's witnesses which had been excepted to in two cases.

When the witness Holbrook was on the stand on behalf of the defence, he was asked whether he did not state to a person named, that there was a man on the jury, and "you bet he knows how I want the case to go"; and when afterwards recalled, was further asked whether he had not said that "when he hears what I have got to say, he will tremble." As this was emphatically denied by the witness, and not proved, we cannot say that any harm was done by it.

The witness, however, admitted, and in this agreed with a witness subsequently called for the Government, that he said he was going on the stand to testify thus and so, and there was a man on the jury who had worked for him for years, and who would believe him, although some people might think he was lying. This statement did not reflect upon the character of the witness, but, taken in connection with his statement that he had extensive business relations with the defendant's brother; had seen him, and had conversation with him on the evening of the killing, and gone to his house the next night, it had some tendency to show bias and a personal interest in the case; which it is always competent for the opposite party to show.

Another witness, James Walker, for the defendant, was asked whether he did not say, in presence of several persons, that there were *niggers on the jury who could be bought, and the defence is rich*, and on his denying it he was contradicted by the rebutting testimony. It would depend much upon the tone and manner in which such a remark was made, whether it would indicate a personal bias on the part of the witness or not. He might desire the prisoner's acquittal and utter this language—coarse as it was—hopefully, or, on the other hand, he might use it deprecatingly, and it is difficult for a reviewing court, not seeing and hearing the witnesses who detailed it, to judge. In the former case it would go to his disinterestedness as witness. His denial of its use at all, contradicted by two witnesses, would rather seem to indicate the former.

At all events, the Justice took pains to limit its effect to the credibility of the witness, and we are unable to say that it necessarily or probably had any other effect.

The complaint is that it tended to antagonize the jury to the witness, to the injury of the defendant. We should not approve the introduction of evidence having only this result. But we cannot subscribe to the doctrine which seems to us to have been carried to an absurd length in some of the courts, that the jury are to be treated as children, liable to be swerved from their sworn duty by every indiscreet statement calculated to wound the feelings of one or more of them; and that a long, painful and laborious trial should be held abortive because one of a cloud of witnesses is shown to have said something so calculated, simply because of a possible or conjectural detriment to the cause of the defendant, of which no actual trace can be seen, cannot be, in our judgment, successfully maintained.

In the case of Cross, we held unwarrantable offers of evidence ground for reversal only when it appeared that the effect of such offers was not counteracted or obliterated, and that it was not only probable, but almost certain, that their effect upon the jury was prejudicial to the accused. We cannot discover evidence of any such result in this case to justify an overthrow of the judgment.

Exceptions were taken to the refusal of the court to admit certain evidence offered by the defendant in sur-rebuttal.

The defendant had testified that in his flight from the scene of the homicide he passed through a certain alley. The Government desired to show that this was not true, because the alley was muddy and the prisoner's shoes, when he arrived at the police station, showed no signs of mud.

Having cross-examined the prisoner on this subject, the District Attorney offered evidence tending to show the muddy condition of the alley and the cleanness of defendant's shoes. The defendant afterwards offered a witness to prove that the alley was not muddy and the evidence was

excluded, on the ground that this matter was exhausted in making out the defendant's case; in other words, that it was a proper part of the defendant's case, to which he had already addressed his testimony, and he could not introduce new testimony on the same subject as sur-rebutting.

The judge seems to have been mistaken in the reason assigned for rejecting the proof. It appears from the testimony before us that the defendant had not offered proof of the condition of the alley, as a part of his case, but only referred to it on cross-examination and in answer to questions by the District Attorney.

If he was contradicted as to these answers he had a right to rebut the contradicting testimony. The mistake was one which any judge might easily fall into from want of recollection of the testimony in a long trial.

But on examination of the evidence, we find that the defendant had not been contradicted by the Government. The defendant said himself, on cross-examination, that the alley seemed to him to be muddy in the center, and therefore he ran close to the fence to avoid it, and that his patent leather shoes were not muddied. And his witness, McAndrews, who went in search of the pistol, said that his own boots were not muddied and the pistol had no mud on it.

Riley, called for the United States, said, portions of the alley were muddy, and portions dry; could not say whether he got any mud on his shoes; would say that the alley was muddy from the telegraph pole to Madison street. It is evident that the statement of Riley and the defendant were entirely consistent. The defendant was not contradicted. An expert from the United States Weather Bureau was called, who had no personal knowledge, and could throw no light upon the question.

It seems, then, there was nothing to sur-rebut, and no harm could have been done the defendant by refusing to admit the superfluous testimony offered.

Another instance of the alleged wrongful refusal of sur-rebutting evidence offered by the defendant has been dwelt

upon. The defendant was cross-examined as to his ownership of pistols. This was not merely collateral matter. The prisoner asserted that he never owned more than two pistols, one a 32-caliber, which he had bought from one Walford, and which he shortly afterwards exchanged with him for a 38-caliber. He was asked whether he had not sold or traded a 32-caliber pistol to one Leroy Willett, representing that he had bought it from Walford, and on his denying it, he was contradicted by Willett.

The defendant then offered to show by Walford's salesman that defendant had in fact bought the 32-caliber from him and afterwards exchanged it for a 38-caliber. It is evident that this did not contradict Willett's statement that the prisoner had also sold him a pistol and represented it as having been bought from Walford. Willett's testimony tended to show that the prisoner had other pistols than he admitted, and tended to weaken his whole testimony on this subject.

The evidence offered in reply to him was not therefore properly sur-rebutting.

I have now noticed the principal questions that have been presented and dwelt upon in argument, which arose first upon the case of the Government, then upon the case of the defence, then upon the rebutting testimony of the Government, and then upon the sur-rebutting testimony offered for the defence.

There are, however, in the brief of defendant's counsel two general allegations of error, embracing a number of particulars, under the following heads, viz.:

"Improper cross-examination and contradiction of defendant on matters purely collateral, to his prejudice," and—

"Improper limitation of cross-examination, and other matters purely collateral to any issue on trial, improperly admitted in evidence, to the prejudice of the defendant."

Under these heads we are referred, simply by the paging of the record, to about forty different specifications of error. We have been at pains to examine each one of these items

of evidence. Some of them have been disposed of in what has already been said. We were satisfied that much of the evidence objected to went fairly to the credit of witnesses; other matters claimed to be collateral were not so, because they showed the personal bias of the witnesses in this particular case; part of them were the searching but legitimate cross-examination of the prisoner himself; and that none of them were plain errors or such as could be of any detriment to the defendant.

As an illustration of this kind of evidence, reference may be made to the cross-examination of T. Franklin Schneider, brother of the defendant. He was asked in substance whether he had not proceeded to foreclose a deed of trust on Dr. Bean's property since the latter had testified in the case adversely to the prisoner. On his denying it, Dr. Bean was called to the stand to contradict him. Objection was made that this was a collateral matter. But it is never a collateral matter to show a personal interest of a witness in the suit, and where it is manifested in an effort to punish another witness for his testimony, it is especially relevant.

We come now to the instruction. Three were granted at the instance of the Government.

The defendant excepted to the granting of these; but we are unable to see any solid objection to them. The criticism of them in the brief seems founded in an entire misconception of their import and not sustained by any authority.

Sixteen instructions were asked on behalf of defendant. Some of them have been anticipated and commented on in what has already been said.

The second instruction related to the subject of reasonable doubt. The judge, refusing to give the instruction as asked, gave an instruction on the same subject in his charge, borrowing it, as he said, from the Supreme Court of the United States (approved in the case of *Hopt vs. Utah*).

The objection seems to be, that if the court chose to substitute for the instruction asked, a form approved by the

Supreme Court, he ought to have given the whole of that, whereas he omitted an important part. The part so omitted was, "That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty." In fact, the judge told the jury that the evidence must satisfy the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion, which expresses the same idea.

The third instruction is faulty in requiring proof of pre-meditation and deliberation, or else that the defendant was engaged in some unlawful act, from which malice is presumed, without giving the jury the slightest idea what acts raise the presumption of malice, and in fact it excludes the case of an unpremeditated deadly assault, without adequate provocation.

The fourth instruction and the sixteenth taken together undertake to state the law as to manslaughter. The fourth mixes up the law of manslaughter and self-defence. The sixteenth would make killing in passion without any provocation manslaughter. The law of manslaughter is sufficiently stated in the charge.

In this connection there is an exception to a part of the charge in which the judge said that in his opinion there was no evidence of passion recently excited, such as would reduce the killing to manslaughter, and that the defendant had put his defence on the ground of fear of death at the hands of Frank Hamlink, and had not claimed that he was carried away by passion. This is substantially correct. The defendant did not pretend that his wife had offered any provocation that could induce a transport of passion, nor did he claim that Frank Hamlink had excited him by mere assault or any other provocation short of a direct attempt on his life, which at once put him upon his self-defence.

The fifth instruction is, in substance, that if Frank Hamlink made an assault on defendant such as to give him reasonable ground to apprehend danger to his life, he was jus-

tifiable in defending himself even by taking Hamlink's life, and if in so doing he unintentionally and accidentally shot his wife, he should be acquitted.

The court granted this, with the modification that the shooting of the wife should not have been careless or negligent. Inasmuch as the careless killing of another is involuntary manslaughter, it was correct to refuse to direct an acquittal on that hypothesis.

The sixth instruction asked was only a variation of the fifth, as to the law of self-defence, and was properly modified in the same way.

The seventh claims that if the prisoner, in defending himself against Frank Hamlink had shot his wife, he should be acquitted, which would include the case of an intentional shooting of the wife, and the court only granted it with the modification that the shooting should appear to be unintentional and accidental, and without carelessness.

The eighth, eleventh and fifteenth, all contain the proposition that if the jury entertain a reasonable doubt whether the defendant fired the shot which killed his wife in self-defence against Frank Hamlink, he must be acquitted. In other words, if the jury entertain a reasonable doubt whether the defendant has made out a defence, they must act as if he had done so to their satisfaction and acquit him. The instruction then would be that if they had a reasonable doubt whether the Government had made a case, they must acquit, and if the Government has made a case, and they entertain a reasonable doubt whether the defendant has shown any defence to it, they must, equally, acquit.

It is hardly necessary to say that no authority has been, or, we think, can be cited for so extraordinary a proposition.

But as already mentioned, as the whole theory of self-defence rests upon the assumption of an accidental shooting, we think the judge would have been justified in declining to grant any of the prayers asked on that subject.

The twelfth instruction required each and every juror to be convinced beyond a reasonable doubt. If such an in-

struction would not be erroneous, still it was not error to refuse it. The jurors perfectly understood that their verdict must be unanimous, and that they must all be satisfied beyond a reasonable doubt. Hence, such an instruction was altogether unnecessary.

We doubt also whether its tendency would not have been mischievous, as encouraging the jurors to obstinate adherence to their individual opinion, instead of a candid interchange of sentiments and efforts to harmonize their views so as to arrive at a unanimous conclusion. This subject was commented upon somewhat in the case of *State vs. Smith*, 49 Conn., 376, in which a somewhat similar instruction was asked, the court saying:

"The prisoner next complains of the court for not complying with his request to charge that 'each juror in this case must be governed by his own judgment, founded upon the law and the evidence, and must not be governed, controlled or influenced by the judgment or opinions of others in agreeing to a verdict.'

"We think this is not sound law, and that the court would not have been justified in complying with their request. Although the verdict to which each juror agrees must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them and with due regard and deference to the opinions of each other. In conferring together the jury ought to pay proper respect to each other's opinions, and listen with candor to each other's arguments. If much the larger number of the panel are for a conviction, a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, and with equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are

for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to, doubt the conclusion of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. This is substantially what was stated to the jury in *Commonwealth vs. Tucey*, 8 Cush., 1, and sanctioned by the Supreme Court of Massachusetts."

The thirteenth instruction is in substance that evidence of a desire on defendant's part to procure a divorce from his wife peaceably through the courts is not legal evidence of a criminal intention or sufficient to justify a presumption of intentional killing. We presume no one would contend the contrary of this, but it is not correct practice to single out isolated facts in this way and ask instructions as to their legal effect, when a number of facts and a whole course of conduct are relied on, collectively, as showing a motive.

The fourteenth instruction would require the jury, as a legal duty, not to attribute an unlawful intent to an act, if it can reasonably be attributed to a lawful intent. We are not aware of any precedents as authority for such abstractions. On the contrary, in *Reeves vs. State of Alabama*, 11 Southern Rep., 158, it was held that it is an invasion of the province of the jury to charge that when a good or bad motive for doing an act can be imputed to the person doing the act, the law says that the good motive must be imputed, if the same can be done from the evidence reasonably to the satisfaction of the jury."

The instruction as to reasonable doubt would seem to embrace everything intended to be claimed by this one. (See *Mitchell vs. State*, 10 South. Rep., 518.)

There were sundry exceptions also to the charge. Some of them have been anticipated in what has been already said.

The first exception is to a general reference by the court to miscarriages of justice in other cases, because it implies

that a verdict of acquittal in the present case would be another example. We are sure that no such idea was intended to be conveyed to the jury, and that no such implication results from the language.

It is also objected that the court commented on the language of counsel in reference to the preconceived opinions of some of the jurors, to the prejudice of the defendant. The record does not show what language had been used by counsel, but it is inferrible from that of the court that it had been in the nature of a criticism on the ruling of the court in adjudging several of the jurors to be competent and an assumption that several of them were prejudiced and unfavorable to the prisoner. It was proper for the judge, in reply, to reiterate his decision as to the competency of the jurors and to controvert the propriety of the counsel's remarks and whether all the reasons assigned by the court were correct or not, we see no impropriety in the conclusion.

The charge is excepted to also because the court said that "a person accused of crime has a right to require that the charge against him shall be legally established by evidence before he shall be convicted. It is a valuable safeguard that accompanies him to that point, and then, having answered its purpose, leaves the accused bare to the grasp of conviction."

Authorities are cited to the effect that the presumption of innocence never deserts the accused until a verdict of guilty is returned. If these cases mean to say that an accused party is still to be presumed innocent by the jury, although they are satisfied by the evidence of his guilt, they announce an absurdity. If they mean anything different from that, we fail to see anything in it but a metaphysical abstraction of no practical application.

It is further objected that the jury were rather invited to render a verdict against the accused by the statement that if the court had erred in its rulings the defendant had his remedy in a higher court. In truth, the court was endeavor-

oring to obviate any prejudice against the defendant in the minds of the jury that might arise from the fact that so many rulings had been made against the prisoner's counsel, and admitted that in some of them there might be error, which the prisoner might have redressed in a higher court; but the jury were expressly told that this was not a matter about which they should concern themselves. In other words, they were neither to infer anything against the prisoner from the court's rulings against him on questions of law, nor were they to question those rulings in the present case, but were to assume them to be correct until reversed. This is only a fair statement of the law.

But the most important objection to the charge relates to the comments of the court on the evidence. There were two objections under this head.

In laying down the law of self-defence, the court qualified the instruction with the language: "The court does not, however, remember or recall any evidence in this case, and, in my opinion, there is none that tends to show an accidental or unintentional killing of the deceased by the defendant." And, again: "If you find no evidence to justify the theory of unintentional or accidental killing of the deceased in defence of an attack from Frank Hamlink, you should disregard that theory entirely." And, again (p. 349, Rec.): "If you find anything in the evidence to justify your consideration of this defence." All this, it is said, is an intimation to the jury that there was no evidence to sustain the theory of the defence.

And it is further objected that the whole discussion of the facts in the charge was an abuse of the authority of the court, was an argument rather than a summing up, and virtually took the determination of the facts from the jury.

It must be remembered that the defendant admitted the firing of five bullets, and the evidence for the Government accounted certainly for two, one of which had gone through a window and the other into the body of Frank Hamlink, and strongly tended to the tracing of the other three into

the body of Mrs. Schneider; so that the whole burden of proof was thrown upon the defendant, and the jury were to ascertain the merits of the defence from a large mass of evidence. Under those circumstances it was certainly proper for the court to direct the attention of the jury to the questions of fact which ought to engage their attention in reaching a conclusion. As long as they are made fully to understand that both the authority and responsibility for the determination of the acts rests with them, it is almost impossible to lay down a rule which shall control and measure the language of the judge in laying down the facts before them. The very intimation of want of evidence, which is complained of here, has been passed on by the Supreme Court in the case of *Rucker vs. Wheeler*, 127 U. S., 85. In that case an action had been brought for commissions upon the sale of property. The Supreme Court say, the trial justice said:

“‘I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff. I say now, generally, upon this branch of the case that it must appear to you, from the evidence that there is an agreement between the plaintiff and defendant, Mr. Rucker and Mr. Wheeler, to the effect that Mr. Rucker was to secure this property for him, and that he was to pay him for that service. The agreement which appears to be stated by Judkins and by Devereux is not of this character; that is, that was an agreement that Judkins would purchase with somebody else, and of course Judkins would be chargeable with the commission if it was carried out.’

“It is insisted by the plaintiff that the court went too far in its expression of opinion upon the evidence bearing upon this issue, and that what was said had practically the effect of taking the case from the jury. It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that ‘when no rule of law is in-

correctly stated, and all matters of fact are ultimately submitted to the determination of the jury,' such expression of opinion is not reviewable on writ of error. Whether the parties made such an agreement for compensation to the plaintiff as that alleged was the only issue made by the first count of the complaint; and that was a question of fact to be determined by the jury. Their right to determine it was distinctly recognized in that part of the charge which immediately followed the court's expression of opinion as to certain portions of the evidence, namely: 'If you can find anything in the evidence to support the conclusion that the defendant made an agreement with plaintiff to pay this commission, and that the property was afterwards purchased by him in pursuance of that agreement, then the plaintiff is entitled to recover; otherwise he is not entitled to recover.' Indeed, we are not sure but that the court might properly have given a peremptory instruction in favor of the defendant upon this branch of the case."

We have already said that the court might have safely declined to give the instructions as to self-defence at all, on the ground that there was no evidence on which to base it, instead of submitting it to the jury to find whether there was evidence.

Perhaps the rule on this subject of the judge's comments on the evidence is stated as explicitly as anywhere else, in the cases cited in the briefs of *Mitchell vs. Harmony*, 13 How., 115, in which Chief Justice Taney said:

"The passages in relation to questions of fact are nothing more than the inferences which in the opinion of the court were fairly deducible from the testimony; and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the Circuit Court ever since the adoption of the Constitution.

"The practice in this respect differs in different States.

In some of them the court neither sums up the evidence in a charge to the jury, nor expresses an opinion upon the question of fact. Its charge is strictly confined to questions of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court.

"But in most of the States the practice is otherwise; and they have adopted the usages of the English courts of justice, where the judge always sums up the evidence and points out the conclusions which, in his opinion, ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.

"It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the State in which they are sitting, that mode of proceeding is perhaps to be preferred which from long established usage and practice, has become the law of the courts of the State. The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *McLanahan vs. The Universal Insurance Company*, 1 Pet., 182, and *Games vs. Stiles*, 14 Pet., 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury; for an objection of that kind questions their intelligence and independence; qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.

"It was in pursuance of this practice that the proceedings set forth in the exceptions took place. When the testimony was closed and the questions of law had been raised and argued by counsel, the court stated to them the view it proposed to take of the evidence in the charge about to be given.

And it is evident, from the statement in the exception, that this was done for the purpose of giving the counsel for the respective parties an opportunity of going before the jury to combat the inferences drawn from the testimony by the court, if they supposed them to be erroneous or open to doubt.

"It appears from the record that the counsel on both sides declined going before the jury, evidently acquiescing in the opinions expressed by the court, and believing that they could not be successfully disputed. And the judge thereupon charged the jury that if they agreed with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant; and upon this charge the jury found for the plaintiff, and assessed the damages stated in the proceedings. It is manifest, therefore, that the Circuit Court did not, in its instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and extent of their own duties and powers. The decision of the facts was fully and plainly submitted to them."

In *Simonds vs. United States*, 142 U. S., 148, the judge refused to discharge the jury at their request because they could not agree, stating substantially that in his judgment the testimony was convincing and he could not understand the failure to agree to arise from any difference as to facts. If any language could be held to have the effect of constraining them to find against the prisoner, this might fairly be so held. The jury did agree to a verdict of guilty. The Supreme Court found no error in the action of the judge. The trial justice said:

"I have the right, under the laws of the United States, to give you my opinion on questions of fact, but I refrain from doing so because I am well satisfied of your capacity to understand what has been testified to in all these days that we have been here engaged. I shall confine myself to stating to you the law by which you are bound, simply calling your attention to the questions of fact which are to be decided

by you, for, as you know, juries decide questions of fact, and not the court."

On the next day the jury came into court and asked to be discharged from further consideration of the case. To this request the court, after ascertaining by inquiry that the jury required no further instructions in matter of law, replied as follows: "This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Whenever, in the opinion of the court, the testimony is convincing, it is the duty of the court to hold the jury together. Therefore I must decline your request to be discharged."

"The defendant excepted to the judge's statement to the jury that he regarded the testimony as convincing."

And yet the Supreme Court said:

"The only other exception argued is to the statement made by the judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar."

Other cases cited in the brief, such as *Carver vs. Jackson*, 4 Pet., 80, and *Hayes vs. United States*, 32 Federal Reporter, 662, sustain the same general doctrine.

In *Carver vs. Jackson*, Judge Story said:

"With the charge of the court to the jury, upon mere matters of fact, and with its commentaries on the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration, as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury, in the exercise of their own judgment, choose to give them."

In the present case, the Justice, after calling the attention of the jury to matters which in his judgment they ought to consider, in connection with the defence, said:

"These suggestions are made to you, gentlemen of the jury, not by way of attempting to take the evidence from you at all, or from your sole consideration. You are the sole judges of the evidence; but the court has thought it only right and proper, in this case, to suggest to you some considerations which should attend your deliberations upon the evidence."

In the light of the authorities cited, it is impossible for us to find the Justice's comments on the evidence were error which subjected his judgment to reversal.

There are perhaps several questions of subordinate importance arising upon the exceptions taken during the trial, which I have not commented upon, partly for want of time; but we have given them our attention, and they do not affect our general conclusions as to the case.

After the verdict a motion was made for a new trial, because of the errors alleged, which have already been discussed, and also because the evidence was insufficient to sustain the verdict, and the overruling of this motion is one of the grounds of the appeal.

It could not be expected that we should enter upon an extended review of the evidence contained in this bulky record, in order to show the grounds of our opinion as to its sufficiency to sustain the verdict. It will suffice to say that we have carefully examined it and deem it amply sufficient to justify the verdict.

I am free to say that under the strong presentation of this case on behalf of the defendant, I was left in doubt, at the conclusion of the argument whether there were not serious errors in this record. Upon a critical examination, some of these apparent errors have turned out not to be real, some of them if real were in the reasons and not in the conclusions of the trial, justice, and some of them if real were cured in the further progress of the trial, examples of all three of which I have discussed.

On a review of the whole case, we have not been able to discover any substantial error that would justify us in reversing the judgment of the Criminal Court, and ordering a new trial.

The judgment, therefore, is affirmed.

NOTE.—After the foregoing opinion was delivered, an application was made by the defendant to the Supreme Court of the District of Columbia for a writ of *habeas corpus*, which was denied. The defendant then applied for a writ of error to the Supreme Court of the United States, to review the judgment of the lower court upon that application. The Supreme Court refused to grant the writ.

Defendant also applied to the Supreme Court of the United States directly for leave to file a petition for a writ of *habeas corpus* to the warden of the District jail, and a writ of *certiorari* to the clerk of the Supreme Court of the District of Columbia. Leave to file the petition was denied, because the ground of the application related to an alleged error in the proceedings of the lower court, and did not go to its jurisdiction or authority.

(In re Schneider, Petitioner, 148 U. S., 157).

REPORTERS.

EX PARTE HOWARD J. SCHNEIDER.

INSANITY; OPINIONS.

1. On a petition for an order postponing the execution of a criminal alleged to be insane, the court is required, before it can nullify the verdict of the jury and the judgment and sentence, to find that the prisoner is actually insane, so as to be wholly unconscious of his situation.
2. On an inquiry instituted for that purpose, the opinions of witnesses, not examined as experts, as to the sanity or insanity of the prisoner, should be based only upon the facts testified to by the particular witnesses.
3. Wickedness is not insanity, and no matter how vile a man may be, he is not to be exculpated and freed from punishment, simply because he is shown to be enormously bad.
4. When the facts testified to by a witness as the ground of his opinion are few or trivial, or simply such incidents as are common alike to sane and insane people, it is improper to ask for an opinion, for it can have no probative force.

Criminal Docket. No. 18,856. Decided February 28, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing in the General Term in the first instance. An examination as to the insanity of a prisoner sentenced to death, was conducted in the presence of the court, the prisoner, and a commission of experts. Upon the report of the commission the court declined to find the prisoner insane.

The facts are stated in the opinion.

Messrs. WILLIAM F. MATTINGLY, JEREMIAH M. WILSON and A. A. HOEHLING, JR. for the petitioner.

Mr. ARTHUR A. BIRNEY, United States Attorney for the District of Columbia, and Mr. CHARLES H. ARMES, Assistant, for the United States.

Mr. Justice HAGNER delivered the opinion of the Court:

On the 9th of April 1892, the jury in the Criminal Court found Howard J. Schneider guilty of the murder of his wife. Various motions were interposed, in his name, in that court

before the sentence on the 7th of May, and up to the signing of the bill of exceptions on the 30th of September. An appeal from the rulings below was heard in the General Term in December, and a judgment of affirmance rendered in January, 1893. Up to this point nothing had been mentioned in the case of any unsoundness of mind on the part of the prisoner. He had testified as a witness in his own behalf before the jury, and his counsel had argued there, as they did before the General Term, that his testimony was entirely competent and reliable, and should be accepted as true.

Shortly after the decision in the General Term, a petition was filed by the prisoner's counsel stating they were informed and had reason to believe, and did believe, Schneider "is now insane"; and they asked for an order postponing his execution, and that the Criminal Court should institute proceedings to ascertain the truth of this averment. The matter was certified to the General Term, which passed an order* postponing the execution and directing a method which seemed to be the best suited to promote the inquiry.

* The following was the order :

"This Court, to assist in ascertaining truly the mental condition of the said Schneider, desires to obtain the opinions of competent medical experts in mental diseases, in the most reliable manner; and to that end this day, *Orders*

"1. That Doctors A. E. Macdonald and Allan MacLane Hamilton, of New York City, and Doctor John B. Chapin, of Philadelphia, be and they are hereby constituted and appointed a Commission to report to this Court, at as early a day as may be convenient, for the consideration of this Court, their professional opinion as to the mental soundness or unsoundness of the said Schneider, the said report to be given in writing, and verified by their oaths thereto appended, taken before the clerk of this Court.

"That the said experts shall make a careful examination of said Schneider personally, both together and by each one of said commission separately at the said jail; in such manner as to them shall seem best; and they are also authorized and empowered to make proper examination of the employees and officials of said jail; in their discretion, under oath, to be administered by a justice of the peace.

"2. It is further *Ordered* that the counsel of the prisoner may procure the services and attendance of skilled medical experts in mental diseases, not exceeding three in number; who are also authorized and empowered to make a personal examination of the said Schneider, either together or separately.

As a means of assisting the court in the examination, three physicians of known eminence in this particular branch of medical learning, were constituted a commission, charged in the order creating it to make an exhaustive examination of the case, and to return to this court upon their oaths a report of their opinions for our consideration. We caused them to be admonished that we desired and expected the most absolute impartiality on their part in the performance of this important service. A like number of experts were authorized to be examined on the part of the prisoner.

The counsel on Schneider's behalf produced all the witnesses they desired, twenty-nine in number, and about the same number were examined on the part of the United States. The examination was conducted in the presence of the court and prisoner, and of the commission. The voluminous testimony has since been carefully examined; the report and supplemental report of the commissioners have been received; and we have bestowed upon the case the fullest consideration. The opinion at which we have all arrived is now to be announced.

The theory of the prisoner's counsel is, that the shock of the sentence of death, coming after the prolonged strain of four months' imprisonment and the excitement of the trial,

"3. It is further *Ordered*, that on Wednesday, the 1st day of February, 1893, at 10 o'clock A. M., this Court will enter upon an examination of the said allegation of insanity of the said Schneider in the court room of the General Term, at which time and place the members of the said commission shall attend, for the purpose of hearing the testimony there taken, and of further observing the said Schneider. And in behalf of said Schneider the said medical experts to be produced in his behalf (as provided in clause No. 2 of this order) together with a reasonable number of other witnesses to be produced on his behalf (in the discretion of the Court) and a reasonable number of other witnesses to be produced on behalf of the United States (in the discretion of the Court), shall be examined, on oath, in presence of the Court.

"4. After the conclusion of the testimony so to be taken before the Court, and of the personal interrogation of the prisoner by the Court, if the Justices shall see fit to make such interrogation, all in the presence of the said commission, the members thereof shall return their report and opinion for the consideration of the Court, in form as is provided in clause No. 2 of this order.

By the Court,

"E. F. BINGHAM, C. J."

acting upon a mind predisposed to disease, operated to dethrone his reason and render him insane; so that he is now unable to appreciate his present situation as a person condemned to death.

On the part of the United States it is contended Schneider never was and is not now insane; that his alleged illusions and mental peculiarities have no existence in fact, but are merely feigned to enable him to escape punishment; and that he is only malingering.

Although this term is comparatively modern, the practice it describes is neither new nor unusual. It is mentioned in the earliest history, sacred and profane. When David fled from the wrath of Saul, he took refuge with Achish, the King of Gath; but fearing the King had not forgotten the death of his champion, Goliath, he sought to excite his pity by assuming to be insane. The incident is thus narrated in the first book of Samuel, chapter 21:

"And the servants of Achish said unto him, Is not this David the king of the land? did they not sing one to another of him in dances, saying, Saul hath slain his thousands, and David his ten thousands?"

"And David laid up these words in his heart, and was sore afraid of Achish the king of Gath.

"And he changed his behavior before them, and feigned himself mad in their hands, and scrabbled on the doors of the gate, and let his spittle fall down upon his beard.

"Then said Achish unto his servants, Lo, ye see the man is mad: wherefore then have ye brought him to me?"

"Have I need of madmen, that ye have brought this fellow to play the madman in my presence? shall this fellow come into my house?"

In the classics we are told that Ulysses sought to escape service at the siege of Troy by feigning madness; and that the herald Palamedes found him plowing the seashore with a bull and a horse yoked together and sowing the furrows with salt. Palamedes detected the trick by placing the infant Telemachus before the plow, and taxed Ulysses with

the deceit when he observed he carefully turned the furrows to save the child.

Junius Brutus and Rienzi, each assumed the character of half-witted to save their lives and at the same time to study the designs of the tyrants they had resolved to overthrow; and this was continued by each without discovery or suspicion for years. The medical books report cases where malingerers for long periods have evaded discovery in hospitals under the eyes of physicians; in one case for two years, until, thrown off his guard and exposed, the fraud was confessed by the dissembler. The resolution with which such men have endured suffering rather than abandon their attempt to escape justice, almost passes belief. But there is an authentic case in which a man submitted repeatedly to severe surgical operations for pretended disease, before he would succumb and admit he had been feigning.

A considerable part of the testimony was addressed to the mental condition of the prisoner's father and to the behavior in early youth of the son; but these statements are comparatively unimportant in view of the great mass of testimony bearing upon the real point of the inquiry—the mental condition of the prisoner at this time, commencing with the day of the sentence.

The testimony of the witnesses for the prisoner was designed to show that about the time of the sentence various alterations in the personal appearance and mental condition of Schneider developed themselves. The first relied on was the change in his personal appearance. During the trial he had been a neat and rather dressy person; but, from the time of the sentence, he began to present a slovenly look; his handsome clothes were laid aside; he appeared at the time of the sentence without a white shirt or collar, in old, ill fitting clothes, the same he wore when before the court here; with a shabby overcoat pinned around his neck, and with hair and beard untrimmed and uncombed.

Indifference to neatness is not an uncommon accompaniment of real madness; but its studied assumption is the

almost unvarying device of the malingerer. Shakespeare gives to Hamlet, and to Edgar in King Lear these readily assumed pretensions to insanity. Hamlet appears—

“ With his doublet all unbraced ; no hat upon his head, his stockings foul’d,
Ungarter’d, and down-gyved to his ankle ;
Pale as his shirt, * * *
His bedded hair, like life in excrements,
Starts up and stands on end.”

Edgar, when determining to assume the part of an insane outcast, to save his life, says:

“ My face I’ll grime with filth,
Blanket my loins, elf all my hair in knots,
And with presented nakedness outface
The winds.”

So simple a device, in itself, can have but little probative force. But the proof here shows that Schneider himself suggested to his mother the removal of his good clothing, and that the old butternut pantaloons and other shabby garments he has been wearing constantly since the sentence, were not his own old clothes, formerly worn by him, but were specially obtained for him; that his outward appearance of squalor did not prevent him from changing his underclothing at proper intervals, and that these were found clean, instead of befoiled, as is the custom with the insane who fall back to the helplessness of infants in this respect; and further that as his beard and hair had already attained a long growth on the day of the sentence, he must have determined upon this carelessness long before that day arrived; and that he in fact appeared in all this disorder of dress and person before the sentence had been actually pronounced, and therefore before the alleged shock could have been fully realized. The explanation that the old clothes were furnished him to lounge in while in his cell does not explain why he should have persisted in wearing them at this hearing, where he was not lounging on his bed, but was all the time seated quietly in his chair.

The alleged delusion that his food was or would be poisoned in the jail, and his refusal on this account to eat, is the

subject of much of the testimony. Dr. MacWilliams testifies that a real refusal to eat was evinced from his first admission to the jail, on the night of the murder. When the doctor's attention was called to it, he endeavored to induce Schneider to take food; but he refused, declaring he would never eat again; but he gradually rallied and his appetite returned. Surely it was not unnatural that one guilty of such a murder should not when first imprisoned, be able to enjoy his meals as if he were at liberty and innocent. From this time until the sentence, there is no defined proof of any failure on his part to take the jail food. After the sentence on the 9th of May, at which time this and all the other delusions, according to the weight of the testimony, developed themselves, the evidence shows that although he refused to take his meals in the day time, as the other prisoners did, he yet ate that same food in his cell every night for at least a month, undeterred by fear of poison. The guard, Payne, swears that later on during July, Schneider at night ate food that he cooked for him at his own house. Crusor, another guard, testifies that after July Schneider received food from him at night up to the first of November, which Crusor had brought him from his house. It was contended it was quite consistent with his alleged fear of poison, that Schneider should have consented to receive food from Payne and Crusor, because he had confidence in them, while he refused it from others. But it remains unexplained why he should not have been equally willing to receive his food from those same trusted hands at the ordinary hours in the day, or after November. We can understand this discrimination if he was playing a part, and, wishing the public to believe he was starving himself for fear of poison, he ate only at night, when observers were in their cells. After November his mother brought him food nearly every day, more than sufficient for his nourishment; and that he ate it is clearly shown by his physical condition, as proved by the witnesses, especially by Dr. Bovee and Dr. Godding. The latter gentleman, produced as an expert witness on the

part of the prisoner, testifies that, after careful examination, he saw no sign of starvation or innutrition, and says in conclusion, "I was compelled to rule out starvation in the case; I thought he got nourishment enough." Indeed, the fact that he lost but nine pounds between the day of the sentence and the hearing here is conclusive upon the point. The utter disproof of this repeated pretension of Schneider that he was starving himself cannot but tend to discredit his assertions as to the other delusions.

The witnesses for the prisoner dwell especially upon Schneider's reiterated assertion that he could not sleep at all; and this assumed fact is much relied upon as evidence of insanity. Could it be possible that a man in his situation, having even the remnant of a conscience, could expect to sleep tranquilly all night without its goadings reminding him of the cause of his imprisonment? He would not have been the first homicide to exclaim—

"Methought I heard a voice cry 'Sleep no more.'"

But Schneider had been imprisoned since January 31 1892, and was now locked up in a small cell, in sweltering weather for much of the time, smoking inordinately day and night, neglecting to take exercise, and lying on his bed much of the day. These would be adequate explanations of a failure to enjoy undisturbed sleep at night. The witnesses who say they saw him awake at all hours of the night, do not state it was at all hours of the same night. Many an innocent person, of sound mind, was doubtless frequently wakeful at times during this period. But the witnesses for the United States give a different version of his habits in this particular. One who chanced to observe Schneider the night before he testified here, stated he thought Schneider slept at least one-third of the time between eight p. m., when he was locked up, and eight a. m. when the cell door was opened—not an insufficient amount of sleep for one lying down much of the day. Insomnolency when a symptom of insanity, is said to be generally complete, and knows no amelioration until the patient succumbs, or artificial means are

applied to relieve it. The strong, indeed conclusive fact, is mentioned by Dr. MacWilliams the jail physician, that although he frequently gave bread pills or similar simples to gratify Schneider's supposed complaints, he never was called on by him to give, and never has given him a narcotic since he has been in the jail. Persons in ordinary health frequently exaggerate their own wakefulness, apparently to excite sympathy or to give themselves a temporary consequence; and Schneider may have mistaken a troubled sleep for wakefulness; even if the entire idea be not unfounded.

The placing of his rocking chair on his bed is shown to have furnished a comfortable support to his back while lying down; and as he occupied the cell in which Guiteau was confined when some one shot at him from the open common outside (which extends up to the outer window of the jail without any protection), he may have hung the chair in the window on the occasion mentioned, either to screen himself from observation, or from what he may reasonably have thought was a dangerous exposure.

The foregoing are all the alleged physical delusions or symptoms complained of by Schneider that may be considered external, and which are therefore capable of actual verification or contradiction by witnesses. The others—such as the whisperings; the voices; the fear of poisoning; the faces in the wall; the throwing of acids in the cell; the refusal to have his hair trimmed from apprehension of personal injury; the alleged belief that his brothers and his mother had turned against him; the pretended electrical inventions; his belief that he owned swift horses and had money in bank—must be taken as actual beliefs and delusions solely upon Schneider's assertion, or not at all. It makes no difference that a score of persons may say he asserted them to be true, there is but one witness to the truthfulness of either of them after all, and that is Schneider himself. Of course, if he did not believe all or either of them, the entire story must be discarded as a cheat. Was there anything in the account given of his previous moral characteristics by his own wit-

nesses, to justify us in believing him in this instance? With one accord all these witnesses agree that from his earliest youth, pre-eminent over all his other vices, was his addiction to falsehood; that his whole talk was a gasconade of impossible exploits and ridiculous lies.

Schneider's testimony before the jury was a coherent defence of himself, from his standpoint, but it was contradicted at every point by disinterested witnesses, who were not on trial for murder and struggling for their lives; and the jury refused to believe him. Why should we believe the present story simply because it comes from him? "What will not a man give in exchange for his life?" In the light of his character, as shown by the testimony of his own witnesses, can any man of sense doubt that if the prisoner really believed he would be allowed to walk unmolested from this court-house if he should now charge the murder of his wife upon his counsel or any other person present, he would hesitate to make the charge?

The authorities state that among the reasons for suspecting dissimulation in cases where the party has been committed for an act which will cause the forfeit of his life, is the fact that his "general character is open to imputations of malice and deceit." 3 Wharton & Stille, Med. Jur.

The evidence is uniform that few persons can more thoroughly deserve to be included in this last description than this unhappy young man, the faithful imitator of Hogarth's Idle Apprentice.

We have no time to enter here upon an examination by comparison of the mass of testimony produced by the opposing parties. We are satisfied the weight of the testimony bearing upon the sincerity of the alleged delusions is very greatly on the side of the witnesses produced by the United States; and hence Schneider's asserted beliefs not only receive no support from the testimony of others, but their sincerity is discountenanced by the great weight of the evidence.

Of the twenty witnesses called by the prisoner's counsel

at this point, eight were employees or prisoners in the jail. Of those called by the government, fourteen were residents or employees there; and their intelligence and apparent candor is equal, to say the least, to that of those adduced by the prisoner.

Many of the witnesses on both sides, not examined as experts, were at the conclusion of their testimony asked their opinion as to the sanity or insanity of the prisoner. Such opinions, of course, should be based only upon the facts testified to by the particular witnesses, and are of value (apart from the character and manner of the witnesses) in proportion to the importance of such facts. Where the facts testified to by the witness as the ground of his opinion are few or trivial, or simply such incidents as are common alike to sane and insane people, it is improper to ask for an opinion, for it can have no probative force. A striking example of this description of opinion is shown in the examination of Mr. Isdell in behalf of the prisoner (479).

The witnesses for the prisoner expressed their opinions as follows:

Wheat, a prisoner in the jail, and who acted as messenger or steward, said:

"I would not like to express a positive opinion as to his sanity or insanity; I think the man's mind is undoubtedly unbalanced, or he is a very fine actor; I have seen persons feign insanity; I do not think he is feigning; I have seen him a half-dozen times—unchanged."

Officer Strong. "Talked with him very little the last two or three months; I would not say the man is crazy or not crazy; he acts like a crazy man; the other day he said, 'how do you do, Mr. Strong?'"

Guard Crusor. "My opinion about it was that his mind was not right at all, with his fasting and smoking so much night and day, and other little matters there; altogether I thought it had affected his mind."

"Question. In your opinion, is he insane or not?"

"Answer. I could not say; I do not know much about

insanity. He don't seem to be right; I don't think he has any appreciation of his present condition, because it don't seem to impress him. He seemed to worry about his wife before she died; after that he got calmer."

Goerke. "I came to the conclusion he was out of his head; to tell you the truth, I did think he was crazy."

Parsons said:

"My present judgment is colored by knowledge (by rumor) that I have had through years. I would say that he has had a long-standing mental cloud—in my judgment."

Warden Burke. "His condition was rather one of mental apathy. He did not appear to anticipate anything; rather indifferent to every thing—appeared that way to me."

Dr. Beatty. "I believed he was crazy when I first saw him in jail, which was when he first came in—a number of weeks before his trial."

This, of course, is inconsistent with the idea that the insane delusions were produced by the trial, conviction, and sentence.

Mrs. Schneider, whose situation when on the stand appealed to the pity of everybody—when examined about the mental condition of her son in his younger days, after speaking of his disobedience and general ill-behavior, said:

"We thought a good many times there was something wrong, from his actions—things that he would do; there was no appearance of insanity in any of the other children; he never mentioned to me the jail food, or the invention, or the poison, or the want of sleep, or the acids, until later on: he was very much excited about the trial and talked over it."

Dr. Walsh, an old acquaintance, said: "People and every one spoke of him as being off, as a youth; impression made on me that there was something wrong with him; that he was not quite right; that he was peculiar; I think he is of unsound mind; I think he has not any appreciation of his condition as a condemned man; before the murder, a long

time ago, I thought and spoke of him as being insane; I think he is suffering from monomania, not dementia."

Dr. MacWilliams. "He is either the sharpest trickster that ever walked, or the man's mind is unsettled. I cannot say that I have observed anything that indicated he is malingering."

Kuhnert, another of the persons in attendance on Schneider, said:

"He talked of poison in April; I would leave him up and in the morning find him up; his peculiar conduct began in June."

Blundon, a former acquaintance, said: "My conclusion was, he was not right, and told his brother he would get him into trouble. I have no facts as far as his conduct is concerned. I never considered him right."

Hurlebaus, a former acquaintance, said: "I regarded him as foolish—a person who did not have all the sense he ought to have; I never thought he did in those days—always looked upon him in that way."

Springman, one of the guards, was the person most with Schneider, having brought him up here each day and carried him back, but no opinion was asked of him.

Mrs. Russell, matron at the jail:

"If it is possible he is shamming, he is the finest actor I ever saw; we have tried to think he is shamming, but I believe it is impossible; he is either insane or his mind is gone; whether it is imbecility or insanity, I am not enough of an expert to say; I should count his reason gone, because I have tried to reason with him and could not; in my opinion he is not shamming; I have never seen or heard anything to make me think he appreciates his present condition as a man condemned to death."

On the part of the United States, the testimony was as follows:

Graham, one of the guards at the jail, said:

"When sentenced to death I think he understood it; I could not say whether he comprehends it now, but I think

he is substantially in the same condition he was then; took food from me and Crusor."

Coleman, a guard, said:

"I do not think he is insane; I have never seen anything to make me think he was, or to indicate he is insane."

Buckley, the steward at the jail:

"Shortly after the decision in General Term I was talking to him about his trial, and told him it went against him; he said he would take it to a higher court."

Dutton, an officer, says:

"I think he knows right from wrong, and appreciates the situation he is in; I never saw anything of an insane nature in him before the trial; his condition is pretty much the same."

Borden, a real estate man, who was intimate with Schneider, said:

"I saw nothing peculiar about him."

Bryan, an officer in the rotunda of the jail, says:

"I do not think he is insane; I think he understands he is under sentence of death, I never did think he was insane."

Woodward, a guard at the jail: •

"On the 8th of January Wheat told me Schneider was sick with a terrible burning, etc.; Schneider then talked very rationally; I told him he was to take a wineglassful of the medicine prescribed by the doctor every two hours; next morning he said, 'I ought to have had the medicine some time ago'; I told him 'No'; he was very much frightened; I think he is sane, and understands and appreciates his situation; I could not say whether the terrible strain of the trial has changed his mental faculties in any way; walking the cell is frequently done by the other prisoners."

Russ, deputy warden at the jail:

"I think he is sane, and has mind to comprehend his situation the same as you do; I do not see any signs of insanity; the change was too sudden; I think he is shamming."

Peacock, a guard at the jail:

"I should take him to be a sane man; I think he under-

stands every thing that is going on, that he comprehends the situation and there is nothing to make me think otherwise."

Houton, his employer when he was in the postoffice service, who, with Arrington, talked with him at the jail, said:

"I could see no reason for thinking him irrational."

Arrington said:

"It struck me that the conversation was entirely rational; nothing odd or peculiar that impressed me; it did not occur to me that he was anything except that he was a sane man; I don't think I had previously heard anything said about his being insane."

Cross, who knew him before his trouble, said:

"I see no change in Schneider."

Dennis, of the Coast Survey, said Schneider was there until 1888 as a draughtsman, and that he observed no peculiarities in him.

Lindenkohl, of the Coast Survey:

"He always talked rationally; I never noticed the reverse."

Fowler, of the Coast Survey:

"Noticed no peculiarities that indicated he was irrational."

Dr. Bovee:

"My opinion was that he was sane—that the delusion, so called, was feigned; as an expert, on all the evidence, I believe he is sane; I so told MacWilliams."

Knight and Slaven say the same.

Roswell A. Fish, foreman of the jury that tried Schneider for the killing of his wife, describes Schneider's conduct during the trial in communicating with his counsel from time to time, apparently in a perfectly sane manner, and says:

"He was always alert; had control over his acts and emotions; keenly sensible of everything going on; deeply aware of what was going on."

Dutton, reporter of the *Star*, in describing Schneider's actions at the trial, said:

"He comprehended everything; I saw nothing to show his mind was inactive; impression made on me was that he was rational."

This witness when asked whether, when Judge Bradley sentenced Schneider, "he did not present a dazed appearance," replied he did not, "but a careless, indifferent manner—he refused to look at the judge."

Joyce, one of the bailiffs of the court, who testified as to his assault on the district attorney on the day of the sentence, said: "I would take him to be a sane man."

McGill, who was a lawyer in a patent attorney's office, where Schneider worked from 1884 to 1886, as a draughtsman, said: "I never saw anything to lead me to suppose his mind was not right."

These are all the laymen who testified as witnesses on the point, and, in number and in importance, those adduced on behalf of the United States decidedly outweigh the others.

The list of witnesses examined on behalf of the prisoner is more remarkable for its omissions than for the names it contains. It is proved that beside Gottlieb Schneider, the prisoner's father, there are four uncles and two aunts, and one uncle by marriage, of the elder generation, living in Washington; and two brothers and five sisters of the prisoner. It also appears that a number of cousins belong to this large family; and yet, in this vital inquiry, not one of these kinfolk is called to testify as to the insanity of the prisoner; his poor mother being the only relative who is asked a word on the subject; although the two aunts and one of the uncles are called, on opposing sides, to speak as to the mental condition of Gottlieb, the father. His brother, William, the eldest son of the family, is placed on the stand on behalf of the prisoner, only to testify as to clothing and food carried to the jail. Can it be doubted they would have been examined upon this all important question, if they could have sustained the prisoner's contention? We are not at liberty to allow this pregnant fact to pass unnoticed.

The broad contention in behalf of the prisoner is that since the impact of the sentence, he has been unable to realize his situation, so that he really knows nothing of his

trial, of his wife's death, of the reason for his being in jail now, of his family or friends, of the season of the year, or of his former home. Several statements made by him, at different periods from the time of the sentence, show clearly that this assumed ignorance must be feigned, if the witnesses are to be believed.

First, the statement of Crusor, that he became more cheerful, calmer, after the death of his wife, is a most significant one, because she would have been a witness against him on an indictment for an assault upon her, and her death removed this danger.

Graham, the guard, says that one night about 6 or 7 o'clock, "he asked me if the court in General Term had decided the appeal against him—if anything had been done in his case." It was in January, 1893. "I told him, yes, the court had decided against him."

This is inconsistent with his idea that he knew nothing about the case.

Buckley, the steward at the jail:

"Shortly after the decision of the General Term, in January, I was talking to him about his trial, and told him it went against him. He said he would take it up to a higher court."

Payne, a guard at the jail, says:

"The evening after he was sentenced, he said he had attempted an assault on the district attorney, but he thought it would have been better if it had been made on his counsel; he said further, 'I made a big mistake to-day at the court, and I am afraid it will go worse with me at my trial.'"

When Russ, who was not a particular friend of Schneider, went to vaccinate him in November, and told him to roll up his sleeve, he consented after an explanation was made of what was wanted.

Peacock said Schneider told him in July, when he was trading some tobacco with him, that he believed he, Peacock, was "one of his friends," and yet, "he never mentioned his notions to him; but said lately, during this investigation, they bothered him a great deal up at the court-house."

Houten, a postoffice inspector, stated that "on the 27th of July, 1892"—and the date is proved by an entry made in his memorandum book—"he had gone to the jail to see a prisoner, and was standing in the rotunda with Mr. Arrington, when Arrington said, 'somebody is there calling you'; he looked and saw somebody at the grating. "Schneider beckoned to me; put his hand through the grate and we shook hands, and he said, 'how do you do, Captain Houten; don't you know me?' I replied, 'no; I do not.' Schneider said, 'I weighed mail for you.'"

Houten said that Schneider had been employed weighing mail; that although he heard of the trial, he paid no attention to it; did not associate him with this Schneider. He asked Schneider what he was doing there, or some remark of that kind, and he told him. He remembered that Schneider said he was not getting enough to eat. "He told me he was there for killing his wife, but said he did not kill her; he would get another trial, and then it would be shown he was not guilty. I could see no reason for thinking him irrational."

Arrington stated that Schneider said:

"I am going to try to get a new trial, and will be acquitted; the trial was a farce; the judge ruled against me every time; I am about starved to death; they don't give me as much food as I can eat."

Cross was committed in June upon the charge of forgery of the name of Mr. Walbridge, and released on bail; Walbridge and Overton had testified against Schneider before the jury. Cross, who had known Schneider before, and had been in the court-house at the time of his trial, stated:

"Four or five days after I got there (in the jail) I went to his (Schneider's) cell. He wanted to know what the people, the business men, outside said of him. I told him I had heard some expressions against him. He told me of several persons who had perjured themselves on the trial; said nothing of poison or noises, or acids or inventions, or his brother's unkindness. Mr. Walbridge came down to see

me on the 10th of July. The next day afterwards Schneider asked me what I was talking to that old s—n of a b— for; that he was a damned old perjurer; that he (Schneider) had tried to get out into the rotunda; if he could have done so, he would have combed his (Walbridge's) head with a chair. Walbridge's next visit was the 13th, or first or second week of August (he knew that by a letter he received at the time). Schneider complained about Walbridge and his wife, scored them, and said Walbridge need not think he was out of it; he had two brothers who would avenge his life if he was hung, because of the perjury; also spoke in the same way of Overton. He also said that Overton was a perjurer; that he need not think he would get out of it; that his brothers would avenge his death.'"

Dutton, the reporter of the *Star*, said that he "was at the jail a few days after the trial. Schneider asked what I thought of the verdict. I told him it was justified by the evidence. He said, 'I don't see how you can think that,' bursting into tears, 'I did not have a fair show; my witnesses were not believed; everybody was against me.'"

McGill, a clerk in the office of Myers, said:

"In February, 1886, I told Schneider a colored boy had told me Schneider was seeking to get him to throw vitriol on somebody he had a feeling against. I told him of the consequences. He said he did not fear the consequences at all; that if he should be arrested he would feign insanity, and asked if I would testify that I believed him to be insane. I told him immediately if moral obliquity constituted insanity I would. A week after his discharge (which was caused by his getting money from one of our clients) he came in the office and whipped out a pistol from his pocket and told Mr. Myers he would shoot him unless he apologized. Whereupon Mr. Myers threatened to throw a paper weight at him and he left the place."

Finally, a young man by the name of Connor was produced, who kept a feed store in the neighborhood of Schneider's stable. The first acquaintance Connor had with

Schneider was when a messenger came to him and told him Schneider had a carriage for sale. That brought them together, and Schneider made purchases from the store. Connor came down to the court during the trial, and had a conversation with Schneider there, and another in the jail. Connor said:

"I saw him after the murder in a little room near the criminal court, down stairs, at the trial. I went out and got him some whiskey twice. Afterwards I saw him at the jail, while the trial was going on. Afterwards in May at the jail, his brother was there. After the trial I received two letters from him asking me to come down there to see him. When I saw him there, he did not speak at first; said nothing for a minute; then he said, 'I feel bad; I didn't want to recognize you at first'; he kind of smiled at that, winked his eye. Some passing officer asked where his brother lived. He first said 'F and 6th street,' he then looked at me, and told him right. As somebody passed by he said, 'The wind rushes down there and sweeps away everything it hits'; he said 'It would be a good idea to write me a crazy letter'; I told him it would be. He said he would be out of there in a few days. He said he wanted to make them people believe he was crazy. He winked his eye a couple of times when he said funny things. I gave him some money; he did not want to ask his brother for it, as he was doing so much for him. He asked for it in a letter, to buy tobacco with."

This is not in accordance with his alleged delusion that his brother was inimical to him, and that he would not see him or have any communication with him.

"He said Marion Appleby served him a dirty trick by not coming down. He told me if I saw him to tell him to come down. He said Jack Green had got a gallon of whiskey for him and drank it all up. This was during the trial. After the sentence he had his coat turned up and undershirt on; no white shirt. He said, 'I wanted to make out as if I did not know you.'"

The inquiry we have been pursuing is one of the greatest interest, and of no little difficulty. It is to test the mind by the only possible agent—another mind; for no other thing is of a grade sufficiently high to serve the purpose—the diamond can only be cut or polished by its fellows.

There are forms of simulation not difficult to detect. Such are the noisy imitations of maniacs which ignorant people who have made no careful observation of insanity suppose to be the constant type of mental alienation. Nature itself aids in the detection of this clumsy form of malingering, for no human frame, not belonging to a madman indeed, can continue such devices indefinitely; and the trickster, if steadily watched, will sooner or later be found remitting his violence when he believes himself unobserved. The more difficult form that seems sometimes to defy detection, is the dull, moody, morose manner—the appearance of imbecility: of inaction rather than action. This is precisely the form Schneider has adopted. The scheme seems to have been matured after the outburst in the court-house on the day of the sentence, when he made an assault on the district attorney. Ever since he has maintained before all but his special friends (as he believed them to be) this impassive demeanor. The difficulty of maintaining this role was presented in the following examination of Dr. Godding, who was being examined by Dr. Chapin:

“Question. In your judgment, is it possible for a person to feign the symptoms you have observed successfully? •

“Answer. It would be difficult. I suppose it is possible.

“By Mr. Mattingly. Question. Would it be possible for an ordinarily ignorant man?

“Answer. No, sir; I think a man must have had some special training in insanity to feign successfully the symptoms I have observed.

“By Dr. Chapin. Question. Suppose he had observed cases?

“Answer. I will allow that.”

We have before us the proof that few persons were more

competent to imitate this special form of mental aberration than Schneider; for from his birth he has had before him his father, whose manner, as described by his poor wife and sister, is almost precisely like that now assumed by the prisoner. The testimony of Mrs. Schneider was that her husband would be smoking, lying around; that he is an old person, and is childish; that he would say every one was against him, and would hurt him; that he was moody and morose; that he said electricity was going out of his hair; that he had staring eyes; would get to smoking, and would not sleep; that he complained of his head; said that his blood was vitiated by the fumes of brass; that he complained of his brother; that he sits at home and does nothing—exhibiting just such symptoms as this prisoner has done since his change of deportment began.

For want of time, I must pass with brief comment the two other classes of evidence adduced. First, as to the mental condition of the father. We are spared the necessity of weighing the conflicting testimony upon that, because we are well satisfied, from all we have seen and read, that the commission was correct in the assertion in their supplemental report, that insanity suddenly developed late in life is not transmittible to the children. While not dissenting from this position entirely, Dr. Godding said, in reply to a remark by Dr. Chapin, "Yes, you must remember that the child born nearest the development of insanity would be more likely to take the symptoms, and Howard Schneider was the first one born after the development." But this statement is not correct. The symptoms spoken of were developed in Gottlieb Schneider in 1862, and in 1863 Alice was born, who was, therefore, the first child born after the attack, while Howard was not born until the spring of 1866: so if it be true "the first child would be more likely to take the symptoms," the sufferer would have been that daughter. Yet there is no pretence of any suspicion of insane taint in that daughter or any other member of this large family.

Another class of testimony detailed Schneider's evil deeds

during his youth and before this crime was committed. It is enough to say that admitting the truth of any one of the iniquities described by these witnesses, or admitting them all together, there is no court in Christendom that would not have told the jury that either or all combined would not be proof of such mental alienation as would justify a verdict of acquittal of crime under the defence of insanity. Wick- edness is not insanity. No matter how vile a man may be, he is not to be exculpated and freed from punishment, simply because he is shown to be enormously bad.

In arriving at our conclusions we think we have given just weight to the opinions of the three experts who testified on behalf of the prisoner. They all admit the case presented here is exceptional—that symptoms are not present that would usually be found in either of the recognized types or forms of insanity, while there are present other symptoms that do not accord with any other type; that the prevailing symptoms are such as would not be expected to develop suddenly, but, would present an onset in a primary or incipient form, followed by an acute form, and then by a terminal stage; that this case is either in the chronic or the terminal form, but that there is no proof of the evolution from the primary stage. If insanity came at all to Schneider, it must be admitted the proof shows it came just after the sentence, in a fulminate form, and fully equipped with all the delusions at once. We have, therefore, the final or the chronic stage established by the proof, and no precursor is shown to have ever existed.

Dr. Godding's theory is, either that this may be one of the very exceptional cases which comes without the usual evolution; or that the previous stages came in fact entirely unnoticed; and that the taint in the father aided in the development. As we are required, before we can nullify the verdict of the jury and the judgment and sentence of the court below, to find the prisoner is actually insane, so as to be wholly unconscious of his situation, we do not feel justified in assuming the present to be so wholly exceptional

a case as either of these explanations would imply; especially as we are convinced the alleged delusions are all feigned for a purpose.

We are relieved to find that our conclusions in the case are in accord with the views of the members of the commission, who, we believe, have discharged their important duties with like impartiality and ability.

It results that we must decline to interfere by deciding the prisoner to be insane, and the law, therefore, is left to take its course.

An order will be passed by the court in accordance with these views.

THE UNITED STATES

vs.

FREDERICK BARBER.

NEW TRIAL; EVIDENCE; COMPETENCY OF JURORS.

1. A motion for a new trial in a capital case is properly overruled when it is based upon an affidavit setting up as newly discovered evidence, a conversation with affiant by a deceased witness, in which the witness stated what he had seen of the occurrence in question; the deceased witness having testified at a former trial, and on the second trial, defendant's counsel having been permitted to state the former testimony of deceased witness.
2. A trial and conviction based upon an indictment subsequently held to be insufficient and void, are nullities and cannot be pleaded in bar of a second indictment for the same offence.
3. A trial court may be entirely justified in accepting one of two jurors and rejecting the other, although their answers may appear from the record to have been identical; for the one may have exhibited in his deportment entire respectability and candor, while the other may have given evidence of insincerity and evil habits.
4. If it appears from the whole examination of a juror that he could render an impartial verdict upon the evidence alone as submitted to the jury, such a state of mind on his part would render him a qualified juror, notwithstanding the alleged opinion he may have formed from reading the newspapers or listening to rumors.

5. A person who is employed as a stamp agent by the Government to sell stamps on a small salary, is not "a salaried officer of the Government of the United States," and as such, exempt from service as a juror, under Section 875 of the Revised Statutes, relating to the District of Columbia.

Criminal Docket. No. 18,999. Decided January 9, 1893.

The CHIEF JUSTICE and Justices HAGNER and BRADLEY sitting.

Hearing on an appeal by the defendant under an indictment for murder from a judgment overruling motion for new trial. *Judgment affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. D. E. CAHILL and A. W. FERGUSON for defendant (appellant).

Mr. C. C. COLE for the United States (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

The defendant was indicted for the murder of Agnes Watson on the 24th day of September, 1888. He was tried, and a verdict of guilty as indicted rendered against him; whereupon he filed a motion in arrest of judgment, on the ground that the indictment failed to allege the death of the said Agnes Watson. Upon hearing in General Term, the motion in arrest of judgment was sustained, and the defendant released and discharged from further prosecution in that case (20 D. C., 79).

He was again indicted on the 14th day of June, 1892, for the murder of Agnes Watson, in the case now on hearing; was tried and convicted, and sentenced to be hanged on the 20th day of January, 1893.

When arraigned upon the indictment in this case he pleaded in bar the verdict of the jury in the first case. To this the United States demurred; and the demurrer being sustained the defendant pleaded not guilty, and went to trial, with the result above stated. He thereupon filed a motion for a new trial, specifying eight grounds of excep-

tion. Of these the third and the fourth were abandoned by the defendant's counsel at this hearing. We proceed to examine the others.

1. The court below properly overruled the motion for a new trial based upon an affidavit of newly discovered evidence, made since the trial, by one Muller, who was about sixteen years of age at the time of the homicide. It set forth an alleged conversation he had the next day with a lad named Larue, then about thirteen. Larue was a witness on the first trial, but had died two months before the last trial. The affidavit professed to state what Larue said he had seen of the transaction on the night it occurred. No explanation sufficient or even plausible was made of Muller's delay for three years and nine months to reveal what Larue had said to him. The supposed communication was distinctly hearsay, and could not have been received in evidence even if a new trial had been granted for any other reason. As one of the defendant's counsel was allowed to give evidence at this trial of what Larue had testified at the former trial, no injury could have been done to the accused by this ruling, if it had not been correct, as it undoubtedly was.

2. The court below was right in overruling the defendant's plea of former conviction. The General Term held the indictment upon which he was convicted on the first occasion was wholly insufficient, because it contained no proper allegation of the death of Agnes Watson. It was therefore void, and really not an indictment for murder, and the trial and so-called conviction were nullities. In the language of the Court of Appeals of Maryland, in 4 Gill, 498, *State vs. Sutton*: "It cannot be said with correctness that a verdict which in legal contemplation is a nullity could jeopard the life or the limb of a party." The former prosecution, therefore, was a mistrial, and there was a perfect right to indict the accused again. *Cochrane vs. State*, 6 Md., 406.

3. The point chiefly relied upon by counsel is the alleged error of the trial justice in overruling defendant's objection to three of the jurors summoned in the cause; upon

the ground that they were disqualified because of bias against the prisoner. Upon their examination to ascertain whether such bias existed, each of them admitted, though in different terms, that he had formed an opinion as to the guilt or innocence of the prisoner; and his counsel insisted the examination proved their incompetency.

The principles upon which this question is to be decided are correctly set forth in *Garlitz vs. State*, 71 Md., 299.

The court there said:

"All persons accused of crime are entitled, as matter of right, to be tried by a fair and impartial jury, selected according to law. About this there can be no question. But the question is constantly presented in practice: by what standard or test is the condition of the mind to be tried, in order to obtain with reasonable certainty, the requisite degree of fairness and impartiality in those called upon to serve as jurors? In this age of intelligence and universal reading, with newspapers in the hands of every man with sufficient intelligence to qualify him to sit upon a jury, to require that jurors shall come to the investigation of crime committed in their community, no matter how notorious or atrocious it may be, with minds wholly unaffected or unimpressed by what they may have read or heard in regard to it, is simply to maintain a rule or standard by which every man who is fit to sit upon a jury may be excluded. Many crimes are committed under circumstances of such flagrant atrociousness as to impress and shock the whole community, the ignorant as well as the intelligent; and if such rule of exclusion were applied, it would in many cases render the impannelling a jury impossible. Such state of things could never be contemplated by the law. All men, by natural instinct, are supposed to be more or less biased against crime in the abstract; and every member of the community, against which crime has been committed, is naturally interested and impressed with the circumstances of crimes of atrocious character. But this natural bias, however atro-

cious the crime, can never be regarded as a sufficient cause for the disqualification of the juror. The intellectual, as well as the moral impressions, produced by the reading or hearing of reports or statements of facts in regard to the commission of crime are such that intelligent minds cannot resist; indeed, in many cases, the mind receives the impressions from such statements intuitively. But these impressions, with intelligent, fair-minded men, are always of a hypothetical nature, resting upon the supposition of the truth of what they have read or heard. The minds of such men are always open to the correction of former impressions, and remain entirely impartial, with power to hear and determine upon the real facts of the case, without the least bias in favor of former impressions, whatever they may have been. And, therefore, in our present state of society, all that can be required of a juror, to render him competent, is that he shall be without bias or prejudice for or against the accused, and that his mind is free to hear and impartially consider the evidence, and to render a verdict thereon without regard to any former opinion or impression existing in his mind, formed upon rumor or newspaper reports. Whenever it is shown that such is the state of mind of the juror, he should be held to be competent; and such is the rule as laid down by this court in the case of *Waters vs. State*, 51 Md., 430. In that case, it was said 'that the opinion which shall exclude a juror must be a fixed and deliberate one, partaking in fact of the nature of a pre-judgment.'"

In *Reynolds vs. United States*, 98 U. S., 156, the court defined the duty of an appellate court when called upon to review the rulings of the trial court in deciding on the qualifications of jurors:

"The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is apparent. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the ver-

dict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court."

The justice and good sense of this rule is apparent when it is considered that the trial court has the advantage of observing the appearance and intelligence of the juror and thus judging of his character, not possessed by a reviewing court. We can well understand that the trial court may be entirely justified in accepting one of two jurors and rejecting the other, although their answers may appear from the record to have been identical; for the one may have exhibited in his deportment entire respectability and candor, while the other may have given evidence of insincerity and evil habits.

This is well stated in *State vs. Muncrath*, 78 Iowa, 273:

"It is the duty of the court, and not of the juror, to determine whether or not his opinion disqualifies him to act as a juror and to decide as to the fact of qualification of the juror from a consideration of such other evidence and circumstances as may be relevant and tend to aid it in reaching a just conclusion. A conscientious juror may be in doubt as to whether the opinion he has formed will affect his verdict, while the court may be entirely satisfied that he would perform the duties of a juror impartially, and in all respects as required by law. Another juror might believe and state that he could listen to the evidence and render a verdict without regard to his previously formed opinion, while the court might be entirely satisfied from the examination as a whole that his opinion could not be readily overcome, and that he could not discharge the duty of a juror properly. The court might be greatly aided in its determination of the fact by the appearance of the juror, his manner while undergoing examination, and circumstances surrounding the trial, and in cases of doubt this

court will not interfere with the decision of the court below."

The almost universal test proposed to ascertain whether the juror entertains a bias or prejudice against the prisoner is to inquire whether he has formed or expressed an opinion as to his guilt or innocence. To remain satisfied with his categorical reply, whether in the affirmative or negative, in a case that has attracted general attention, might do injustice to the prisoner, or to the government; for the juror may either be self-deceived as to what constitutes a disqualifying opinion; or he may be willing the court should be deceived. Unfortunately, the increasing disposition of the better class of jurors to avoid service in capital cases is a matter of common observation. To the natural reluctance that all persons must feel to stand as arbiters of life and death, is added in their case, the certainty of serious discomfort from prolonged confinement, increasing in duration with the constantly increasing length of such trials; and the apprehension that, in the words of one of the judges, when the trial of the prisoner is ended in conviction, that of the jurors may be expected to begin. Under such influences, it is not altogether surprising that one may be willing to persuade himself he holds an opinion that would disqualify him. To accept such a response without further inquiry would soon result in a practical impossibility to obtain a respectable jury at all, in a conspicuous case, and the accused would either be tried by unfit jurors, in the interest of a notable prisoner, or go untried altogether and ultimately escape any punishment beyond such pecuniary mulct as may represent the expense he or his friends have incurred in warding off a trial. The good order and safety of society require that such a result should be prevented, for the public has as great an interest at stake as the prisoner.

The jury duty devolved upon the citizen is no more voluntary than his similar obligation to render military service. He can escape from neither upon the strength of his mere representation of his unfitness, and thus be allowed at his will to

cast his obligation upon others, whose burden grows heavier by every such exemption. The duty of the examining authority, instead of ceasing when the citizen, in either case, has made his general claim to exemption, may more properly be said to have then really begun.

In the Burr trial, every one of the hundreds of persons summoned as jurors, with scarcely one exception, answered on his *voir dire* that he had formed an opinion. The attorneys for the United States could not have been far wrong when they expressed their belief that to obtain a jury in that case entirely free from all opinions as to the guilt or innocence of the prisoner was not possible, unless it should be dropped from Heaven, or be composed of hermits who had passed their lives immured in caves or hollow trees.

The same conditions appeared in the Guiteau trial.

But impartial jurors were finally obtained in each case, by a careful analysis by the court of the sources and extent of their alleged opinions. There must be few persons of intelligence in this country, who have not heard and participated in discussions as to the probabilities of the guilt of the person charged with the savage murder of her parents at Fall River a short time since; and atrocious crimes committed in even foreign countries, attract almost the same degree of attention here, and give rise to similar expressions of opinion, on the newspaper accounts of the facts or of coroners' inquests. But as all sensible persons observe the reports vary in the different newspapers of the same day, and in successive issues of the same newspaper, it is impossible to believe such opinions can have a disqualifying effect upon the minds of men of average good sense. If this were so, the very lawyers who are employed to defend the accused and are on the alert to pronounce intelligent jurors disqualified, would find it their duty to decline service in a case they had thus necessarily prejudged.

Although the oath taken on the *voir dire* is to make true answers to such questions as may be asked by the court, the examination is often conducted in great part by counsel

whose experience has taught them exactly what are the crucial points involved in the inquiry. Under such examinations, an ignorant person, appearing in court perhaps for the first time as a juror, with the limited vocabulary of the uneducated, may naturally assent to questions not fully understood; or by using technical terms in an inexact manner, may indicate the formation of disqualifying opinions; until a careful examination by the judge, the one person concerned in the inquiry who must be supposed to be entirely disinterested in any result except the attainment of justice to the prisoner and the community, may evince an impartiality fitting him to serve.

In *Clark vs. Commonwealth*, 123 Penn. State, the court enforces this idea, and the more recent decisions of the highest court of that State are in entire accord with these utterances. In 126 Pennsylvania, page 71, *Rizzoli's Case*, the court uses this language:

"There was a time when a stricter rule prevailed, and a juror was excluded from the box when he had formed an opinion as to the guilt or innocence of the accused. At that time, intelligent jurors could be found who had formed no opinions in regard to a case, for the reason that they had heard or read little about it. That was before the telegraph and the press brought to every man's door the news of every event and every crime, within a few hours of its occurrence, with full details of everything connected therewith. All this is now changed; within twenty-four hours of the commission of this murder, it is safe to say that by means of the wire and the press, the details of it had been read by nearly every intelligent man, not only in Luzerne county, but in the State, and that but few persons had not formed some opinion in regard to it. The law upon this subject has necessarily advanced with the changed circumstances; it has merely kept abreast of the times, and adapted itself to what the common judgment and common sense of the people see is essential to the proper administration of the criminal law. To return now to the old rule would exclude

from the jury box in many instances every man of average intelligence."

And in 129 Pa. State, Com. *vs.* Taylor, Chief Justice Paxton, after a repetition of the true rule to be observed by the court in passing on challenges to jurors, says: "We need not discuss the subject further; it is worn threadbare and the law ought to be well understood."

It seems to us this is but a recital of the principles declared by Chief Justice Marshall more than eighty years ago in *Burr's Case*. Unfortunately, in later days, there was exhibited in certain parts of our country a departure from them which culminated when a disclosure was made in a western city that the friends of prominent criminals had collected all the unfavorable notices of the accused, and had mailed them to each juror on the panel whom they wished to remove from the jury. Upon the admission by the jurors that they had read the notices and had formed an opinion upon the assumption of their truth which it would require evidence to remove, they were held incompetent to serve. The statutes since passed in many States, like that commented on in the *Spies Case*, were the expression of the indignation of sensible people at this departure from these rational principles.

The first juror whose examination is made the subject of exception in the present case was Peter A. Mattern, who said he had read the account of the trial in the newspapers when the trial was on before, three or four years ago, and had formed an opinion; but notwithstanding that opinion he could listen to the testimony and bring in a verdict based upon the evidence and the law as he heard it, regardless of that opinion. On cross-examination, he said the opinion he had formed was still in his mind. "It is not quite fixed, but it may be altered by evidence. It would require evidence to alter it. I have an opinion formed, a distinct impression upon my mind that it would require evidence to change or alter." On his redirect examination, he said: "I understand that if no evidence should be introduced I

cannot find a verdict against the defendant upon the opinion I have; that the verdict must be rendered upon the evidence I hear in court and not on what I have read. I think I can render a verdict in the case upon what I hear here, and not upon the opinion that I have now. The opinion I have formed is at present settled and fixed in my mind. If the evidence at this trial should be the same as the last, I do not think my opinion would be changed in any sense. I read the evidence at the last trial. Probably if I heard the evidence word by word, my opinion would be changed."

He afterwards said: "I have not expressed an opinion, but I had formed an opinion at the time from reading the newspapers. I can listen to the evidence now and bring in an impartial verdict based on the evidence alone. The opinion formed by me was based upon the evidence given at the last trial, read by me in the newspapers. It was on the account in the newspapers of the transaction at the time it happened and the report of the trial when the trial was on. I am of the same opinion still. The opinion was formed from reading the testimony, the evidence, as delivered in court on the last trial of this case. I was not in court at the last trial, but I read the evidence in the newspapers."

He was asked the question: "That opinion would remain in your mind and would influence you more or less all through this trial, would it not, if you were to sit on the jury?" He answered: "I do not know whether it would influence me upon the evidence that I hear now. I cannot recollect all the evidence that was given at that time in the newspaper now, but if all the evidence of all the witnesses was given here, and I was on the jury, I could probably give a fair verdict. The opinion that I formed from reading the evidence at the previous trial is in my mind now, but it would not control my verdict in this case to any extent."

Thereupon, having been pronounced competent by the court, the juror was peremptorily challenged.

Charles C. Bryan was the next juror sworn.

"Mr. Cahill. You have formed an opinion?

A. Yes; I think it is likely that I have.

Q. And you have told us that it would require strong evidence to change that opinion? Is not that the fact?

A. Yes; that is the fact.

The Court. You mean that the prisoner would require—

The witness (interrupting): It would require of the defendant strong proof of his innocence."

The witness was told to stand aside, but was afterwards recalled, and stated as follows:

"Notwithstanding the opinion I have formed, I could give an impartial verdict upon the evidence and law as it might be given here in court.

Mr. Cahill. The opinion that you have formed is your opinion at this moment; is it not?

A. Yes; I think it is.

Q. And that opinion is formed both from the newspaper accounts of the occurrence and also of the account of the trial?

A. Yes."

Upon further examination of Mr. Bryan by counsel for defendant, he stated that he had no doubt but that he could give the defendant a full, fair and impartial trial solely upon the evidence that might be given in court.

Thereupon (the juror being accepted by the court), the defence challenged him peremptorily.

The next juror sworn was John Ockershausen, who testified:

"I have talked about the case, but I did not exactly form my opinion about it. I have read about it in the paper. I guess I could listen to the evidence and return an impartial verdict. I have not exactly a bias for or against the prisoner. I do not know him." On cross-examination he said: "I have talked to various persons about this case at the time it happened; talked about it frequently. I have not exactly an opinion in my mind now, but at one time I made up my mind. It was thoroughly made up at that time. I

do not know that I have exactly changed my mind. I have not heard anything about the case which has changed my mind, and I am of the same opinion still. I guess it would require strong evidence upon the part of the defendant to change my opinion."

The juror was afterwards further examined, and said: "I guess I have an opinion as to the guilt or innocence of the defendant. The opinion is based upon what I read in the newspapers, but I can listen to the evidence in the court and render a verdict in accordance to the sworn evidence I hear." On cross-examination, he said: "I think that my opinion is a strong and pronounced one, and it is still in my mind. I have never changed it."

"Mr. Cahill. Now, I ask you if it would require evidence to change the opinion, and I want you to answer that question yes or no. Would it require evidence to change that opinion?"

The court. I do not think that is a fair test. I notice that the jurors do not understand the question at all, and I do not think it is a proper question.

Mr. Cahill. Is that opinion for or against the prisoner still in your mind?

A. Yes.

Q. You say that this bias for or against the prisoner is still in your mind?

A. I say that it is not exactly now in my mind.

Q. Are you of the same opinion now that you were when you formed an opinion on reading the account of the last trial in the newspapers?

A. I guess I am of the same way now, yet.

Q. Would it require evidence to change it?

Objected to by the court.

And thereupon the juror having been declared competent by the court, the defendant challenged him peremptorily."

It will be observed that neither of these jurors pretends to any personal knowledge of any of the facts of the case; nor that he had talked with any person having such know-

ledge, nor that he had received whatever opinion he entertained or had formed from any source other than reports in the newspapers and rumors; nor that he entertained any ill-feeling toward the prisoner; neither can the testimony of either juror, when considered in its entirety, be fairly taken as showing that he held an opinion which could be considered as "positive" or "decided" or "substantial" or "fixed" or "deliberate" or "settled," as the opinions that have been held disqualifying have been previously defined by the authorities. Taking all his testimony together, each juror sufficiently states that he could render an impartial verdict upon the evidence alone as delivered to the jury: and such a condition of mind on his part would render him a qualified juror, notwithstanding the alleged opinion he may have formed from reading the newspaper or listening to rumors. As neither of them served upon the jury that rendered the verdict against the prisoner, whatever injury is claimed to have been suffered by the prisoner in being obliged to use his peremptory challenges to remove them must be purely conjectural; although he has the right to an examination on appeal of the correctness of the rulings of the judge below as to their competency.

Their responses are criticised upon the ground that they spoke with a reserve or hesitation as to their capacity to render an impartial verdict, using the expression, "I think," "I guess." But they made use of the same form of expression when avowing the formation of an opinion; and if this is to be understood as implying a positive affirmation, it should equally when used by the same men in negation, be taken as implying positive denial. The expressions are used by court and counsel in the questions, as well as by jurors in reply. True, by a particular emphasis, a more or less doubtful meaning might be attached to them, as "I *think* I could," rather than "I think I *could*." But the justice below heard the words uttered, and could better apprehend the meaning of the speaker. That the phrase *ex vi termini* imports no such uncertainty, sufficiently appears from

its frequent use in many cases where it was received by the court as a positive assertion—as in the Reynold's Case, 98 U. S., 146; and in the Spies Case, 123 U. S., 131, where the witness Denker used the words "I think" twelve times, in replying to such inquiries on his *voir dire*.

Ockershausen, in reply to a question, said: "I have not exactly a bias for or against the prisoner." Subsequently the defendant's counsel asked him: "You say that this bias for or against the prisoner is still in your mind?" to which he replied: "I say it is not exactly now in my mind."

In 120 U. S., 432 (Hopt *vs.* Utah), the expression was used by a juror under examination, "that possibly his impressions were strong enough to create, from sympathy, some bias or prejudice, but he thought he could sit on the jury, and be guided by the evidence," etc. But his whole examination satisfied the trial judge of his competency, and that ruling was approved by the Supreme Court.

Again, it is insisted the opinion avowed to have been formed by the jurors must be held to be necessarily disqualifying, because they stated, in reply to questions asked a moment afterwards, they still held those opinions (as if that fact evinced a certain obduracy on their part) and that it would take evidence to remove them.

In Garlitz *vs.* State, 71 Md., 301, the court, speaking of this mode of examination, said:

"It is urged, however, that these talesmen swore they still retained their original impressions in regard to the case, and that it would require evidence to remove such impressions, and therefore the challenges should have been allowed. But it is a very simple and elementary law of the human mind that an impression once made will not be effaced without some adequate cause to effect the result. A man cannot readily divest his mind of former impressions without reason or evidence therefor, and render his mind a blank at his mere will. It was, therefore, quite natural for these talesmen to say that it would require some evidence to change their former impressions. Indeed, such must be the case,

to a more or less extent, in all instances where jurors are sworn who had previously formed opinions or impressions in regard to the case, upon rumor or newspaper reports. But it does not follow that such condition of the mind renders the juror incompetent. *Spies vs. Illinois*, 123 U. S., 168."

After a careful examination of the testimony of the jurors and of the numerous authorities discussing this important question, we are all of the opinion there was no error in the rulings below as to the challenges on the ground of bias.

4. The court below admitted as a competent juror Thomas A. Dobbys, who, it was claimed, was "a salaried officer of the Government of the United States" and as such exempt from service as juror, against the challenge of the defendant; and to this ruling an exception was taken. It appeared the juror expressly claimed the benefit of the exemption, under Sec. 875, Revised Statutes of the District of Columbia, which declares that "all executive and judicial officers, salaried officers of the Government of the United States, commissioners of police, etc., etc., shall be exempt from jury duty, and their names shall not be placed on the jury lists."

We decided in *United States vs. Lee*, 4 Mackey, 489, that exemption from jury duty, under that section, was not a disqualification of the juror from service, but a personal privilege only, and unless he chose to make the claim, it could not be taken advantage of on a motion for a new trial. In that case, no such claim had been interposed by the juror who was held to have thereby waived his personal privilege, and hence the defendant could have no ground for complaint. Where the juror, as in the case at bar, insists upon his exemption, "the court," in the language of 43 N. H., 89, *State vs. Forshner*, "would ordinarily decline to hold him to a duty to which he is not liable, and would, of course, excuse him." 57 Maine, 396, *State vs. Quimby*.

But we are of the opinion the case of this juror was not

within the exemption of section 875. His claim was that he was employed as a stamp agent by the Government to sell stamps, and received a small compensation per annum. This employment did not constitute him "a salaried officer of the Government of the United States."

All employees and agents of the government are not officers in the proper sense of the term. In 99 U. S., 508, *United States vs. Germaine*, it was held that a civil surgeon, appointed by the Commissioner of Pensions to make examination of pensioners, at a designated compensation for each examination, was not within the terms of a statute punishing every officer of the United States who should prove to be guilty of extortion. In 17 S. & R., 219, *Commonwealth vs. Burns*, an editor appointed by the Secretary of State to print the laws of the United States in his newspaper, was held not to be disqualified to act as an alderman of Philadelphia, under a statute which provided that every person who should hold any office or appointment of profit or trust under the United States should be incapable of acting as an alderman, etc., of any city in Pennsylvania. In the words of Chief Justice Marshall, 2 Bro. C. C. R., 103, *United States vs. Maurice*, "although an office is an employment, it does not follow that every employment is an office."

The act of Congress in 1889, Ch. 374, authorizing the Postmaster-General to fix the salaries of certain clerks and employees attached to his department, and the subsequent order fixing their compensation, provides that "stamp clerks" shall receive a salary, at a stated rate, and that stamp agents shall be compensated at \$24 per annum. Mr. Dobbins was precisely what he described himself to be, "a stamp agent"; an employee of the department, but neither a clerk nor an officer in any legal sense. We think, therefore, the trial justice had the right, in the absence of any other objection, to require him to serve as a juror.

5. It remains to consider whether, as is insisted by defendant's counsel, the verdict of the jury was against the

evidence. We have examined and compared the testimony of the different witnesses, and the result of the conflicting statements is about as follows:

The witnesses for the prosecution testified substantially that the prisoner for three or four years had been living with Agnes Watson as his mistress in Washington, near Rock Creek. They were both colored people, as were most of the witnesses. The woman had become jealous at Barber's attentions to Celia Mahoney, with whom he had consorted for two years. She lived in Georgetown, on Thirtieth street, half a square north of the canal. Mary Hardy, about noon on the day of the drowning, saw Barber and Agnes in their room quarrelling; he took some money from her and then knocked her down with his fist, and kicked her, and said: "God d—n her heart, he would kill her"; after 11 o'clock at night, and about half an hour before her death, Agnes came to Celia's house, where Barber then was, and sent a message to him to come out, as she wanted to see him; Barber replied, "God d—n her, if I come out I will kill her." Agnes was not told what Barber had said, and she sent another woman with the same request, to which Barber made the same reply. Agnes remained in the yard for about fifteen minutes, when Barber came out of the house; a quarrel soon ensued, and he knocked her down and kicked her or stamped on her about the body as she clutched his feet.

As he walked out of the yard, Agnes followed him, and he said to her, "If you follow me I will kill you," to which she replied she would follow him; whereupon he again knocked her down: The same warning and answer and blows were repeated at least twice as they walked south along the sidewalk until he reached a path leading through a vacant lot to the towpath of the canal, down which he walked, followed by Agnes. Seven witnesses, with unimportant differences of language, testify to the occurrences up to this point.

Edward Brown and James Brown, his brother, saw them

soon afterwards standing together near a post on the towpath, and swear they saw Barber again knock Agnes down, kick her, choke her and throw her into the canal. Martha Washington and William Johnson also testify they saw him throw her into the canal, but say nothing of the blow or choking. Barber remained on the towpath a short while after he had thrown her into the water, but made no effort to rescue her; and after a crowd assembled, walked up the bank and returned to Celia Mahoney's house by another street. Celia had heard by that time of the woman's death, and asked him what had become of Agnes, to which he replied he didn't know, that she had gone home; and Celia then told him to go. Before he left the canal bank, and while efforts were being made to recover the body, Turner asked Barber what had become of the woman, and he replied, "D—d if I know; I have just come from the ice-house." Martha Washington testified that Barber said in her presence on the towpath "That d—d woman has jumped overboard." Mary Smith met him on Jefferson street shortly after he left the canal; asked him where Agnes was or what had become of her, and he replied he thought she had gone around the square and gone home.

Sanford, a policeman, arrested Barber the next night on a charge of murder, about 9 or 10 o'clock, when he was in bed at his brother's house. He testified that on the way to the station house he asked Barber how it happened, and he replied that he pushed her and didn't know whether she fell in the water or not. Another policeman said that on the day following the arrest he told the prisoner "they had charged him with having thrown the woman into the canal," to which he replied, "Well, maybe I did."

The defence was that the deceased, in a fit of jealousy, because of her desertion by Barber, had committed suicide by throwing herself into the canal. In support of this theory, Reuben Johnson and his wife testified in his behalf that on the morning of her death they heard her say if Barber married Celia, she would either drown herself or take

poison to kill herself. A policeman, Barry, who was with the squad that accompanied Barber to the station house, testified he heard him make no remark to Sanford in reference to the drowning; though Sanford had immediate charge of the prisoner and might have asked the question and received the reply. The deposition of Mr. Burroughs, a white man, which had been read at the first trial, was also admitted in evidence in behalf of the prisoner. He deposed he lived across the street from Celia Mahoney, and about 11 at night was attracted by a noisy crowd in front of her house; he heard oaths and screams of a woman, and on crossing the street he was told a colored man was beating a woman; the man then came out of the yard, and seemed to be trying to get away from the woman; the crowd prevented Burroughs from seeing the parties as they walked towards the canal. The witness walked down to the path, and saw the man and woman and the boy Larue on the towpath; his attention was then diverted from them, and presently there was a cry that the man had thrown the woman overboard; and he then walked down to the towpath and had a conversation with Larue; Officer Riley came up, and asked Barber where the woman was, and he replied, "I don't know; but think she is over there," pointing to the lock; he didn't see Barber after the crowd became loud and clamorous; the moonlight was unusually bright that night; after the exclamation was made about the woman being in the canal, he had walked down to the towpath and saw her hat floating on the water. He did not say anything as to having seen the woman in the canal.

Mr. Fergusson, one of defendant's counsel, swore the boy Larue, then thirteen, testified at the former trial that he saw Agnes follow Barber down the street and heard him warn her to go back, and heard her refuse to do so, but saw no blows struck; that after they had gone down on the towpath, he followed them there and heard Barber again tell Agnes she had better go back, and heard her say she would not; that the woman then went and sat down on the

coping of the lock, and Barber turned toward her, and said, "You d—d old fool, get up from there"; "that Barber turned, and she slipped right into the canal"; that Barber pushed Agnes in front of Celia's house, but he saw no blows struck; that Larue at one time in his testimony said the defendant was about 40 feet from the woman "when he pushed her in," but at once corrected himself, and said "when she pushed herself in."

The prisoner denied all previous threats against Agnes, or quarrels with her; he denied all blows given her that night, or any violence except pushing her in the yard, and shoving her against a tree when they reached the sidewalk. He positively denied that he threw her into the canal or wanted to get rid of her, and asserted she slipped or jumped into the canal herself, while he was 30 or 40 feet from her; that he did not go in after her because he could not swim. He denied having made the so-called confessions to the policeman, or the contradictory statements testified to by the other witnesses; said he did not mean to try to escape by going to his brother's; and that he did not see that night some of the witnesses for the prosecution near the place.

We have considered it proper to make a careful examination of the law and the facts, all the more solicitously because the prisoner belongs to an unfortunate class of people who ordinarily have no sufficient means of their own at command to maintain long proceedings like those in this case. But he has not suffered in this respect, for zealous and able counsel have done whatever was possible in his behalf. The unfortunate woman belonged to the same class, and had the same right to her life that he had to his; and it is the duty of the law to see that her destroyer should not escape punishment, if he is guilty: "The judge is condemned when the guilty escape." By a great preponderance of witnesses, establishing his guilt beyond the reasonable doubt of the law, he has been shown to be guilty of the heartless murder of this poor creature, so long under his dominion and the helpless object of his brutality.

We can find no reason for believing upon the whole testimony, the jury was not entirely justified in rendering the verdict of guilty that had been given by their predecessors on the former indictment. Upon the motion below for a new trial, based upon the same ground, the presiding justice declined to interfere, and his action in this respect confirms our belief in the propriety of the verdict.

We have no alternative but *to overrule the motion for a new trial, and remand the case to the Criminal Court; and it is so ordered.*

MARTHA DIGGS

vs.

WILLIAM H. A. WORMLEY, TRUSTEE, ET AL.

SLAVE MARRIAGES; PRESUMPTIONS.

1. Where two men recognize each other as brothers, and are shown to have done so at a period so remote that it is impossible to find living witnesses acquainted with their ancestors, the law will allow the jury to presume that their parents were legally married.
2. The same presumption applies to former slaves, that under such circumstances the marriage of their ancestors was lawful, that is to say, a marriage with the consent of their masters.
3. *Quære*, whether it was ever necessary in this District, for the purpose of legitimating the issue of slaves, to prove a marriage *in facie ecclesiae*.
4. Under the act of Congress of Feb. 6, 1879, (20 Stat. 282), if two colored people, one or the other of whom were slaves, have lived together as husband and wife for a long period of time, and were reputed to be married, and were so treated and understood to be by their friends and the community in which they lived, they will, for the purpose of inheritance, be regarded as having been lawfully married.

Equity. No. 13,285. Decided January 16, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an appeal by the complainant from decree dismissing a bill to set aside a deed of trust sale. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. J. H. ADRIAANS for complainant (appellant).

Messrs. JAMES H. SMITH, E. H. THOMAS, J. G. BIGELOW and EDWARDS and BARNARD for defendants (appellees).

The CHIEF JUSTICE delivered the opinion of the Court:

The bill and allowed amendments in this case show that one Larkin Johnson died in 1885, intestate, seized and possessed of lots 16 and 19 in section 9 of the sub-division of St. Elizabeth, called Barry Farm, leaving surviving him the complainant and defendants, George, Benjamin and David Johnson, together with Annie E. Hackett, child of a deceased daughter, and Mary Johnson, as his five children by his first marriage with Lucy Ann Shipley, now deceased, "whom said Larkin Johnson married"; also defendants Emily C. E. Johnson, now Brown, surviving widow, and Ida Berry, and Fanny, Emma and Robert Johnson, as his four children by his second marriage, with Emily C. E. Johnson, now Brown; that on June 22, 1891, under an outstanding deed of trust upon these lots, defendant William H. A. Wormley, trustee, sold the same at public auction pursuant to a public advertisement requiring only one-third of the purchase money in cash, balance in six and twelve months with interest, or all cash at the option of the purchaser:

The sale took place during a hard rain, and the auctioneer changed the terms at the sale, and without previous warning, from one-third cash to all cash. The bill alleges that the sale was made for \$2,400, a grossly inadequate consideration, to defendant Wallace T. Chapman, who assigned his bid to said Emily C. E. Johnson, now Brown, and a deed was subsequently made to her by the trustee for a recited consideration of \$2,200.

The bill further alleges that subsequently Emily C. E. Brown executed a deed of trust to Brainard H. Warner and John T. Arms, trustees, to secure one Nathan Sprague the

sum of \$450; that this \$450 was all the money that ever passed from the purchaser to the trustee who made the sale, and no proceeds from said sale were ever distributed to complainant or any of the children of Larkin Johnson by his first marriage; that holding the sale during inclement weather, changing the terms at the sale and without previous warning from one-third cash to all cash, reducing the purchase price from \$2,400 to \$2,200, and the circumstance of but \$450 passing in good faith between Emily C. E. Johnson and the trustee, were evidences of collusion on the part of those concerned in said sale to deprive the five children of Larkin Johnson by his first marriage of their share in the property of their father.

Wherefore, it was prayed that the sale and the subsequent deed of trust be set aside, and that defendants disclose their knowledge of the aforesaid proceedings.

The defendant Wormley, trustee, answered denying any knowledge of the marriage of Larkin Johnson with complainant's mother. He admits that the sale took place during a rain and the change of terms as alleged; that the sale was for \$2,200 and made to Chapman and by him assigned to Emily C. E. Brown, and that no distribution of the proceeds was made, as there were no proceeds. He denies any conspiracy or combination.

Emily C. E. Brown answered, reciting her connection with the property before the sale, and says, that she has no knowledge as to the parentage of complainant and her alleged brothers or as to the marriage of their alleged father and mother, but as to all such matters she leaves the complainant to maintain her bill by proof. She admits the sale in the rain and the change of terms, but denies any collusion with any one. She alleges her own children are willing she should retain their portion, hence no distribution was made. She states that she is willing to account for the proceeds whenever the children of the first marriage are held to be entitled to any portion of them.

The children of the second marriage answered adopting

the statements in the answer of their mother, Emily C. E. Brown.

Chapman answered denying collusion or bad faith. He admits that he loaned \$340 to Emily C. E. Johnson, now Brown, to enable her to pay off expenses of sale and debt on the property and took a deed of trust as alleged.

The heirs of Larkin Johnson, by his first marriage, (defendants) answered admitting the recitals in the bill and joining in the prayers thereof. They deny having received any of the proceeds from said sale.

Isaac S. Lyon was on January 22, 1892, made a party defendant in the place of the defendants who are the alleged heirs of Larkin Johnson, by his first marriage, excepting the complainant. He applied to be substituted for complainant in the court below, but was refused. The testimony was taken and the cause heard and a decree signed dismissing the bill without prejudice.

From that decree the complainant took an appeal to this court.

The real question at issue was in relation to the alleged first marriage. I believe it was conceded by counsel for the widow and the second set of children, at the hearing, that they would not contend that the court should not set the sale aside if there was sufficient proof of the right of the complainant here to maintain this action.

We have carefully read the evidence in relation to the first marriage. Mrs. Blew, a lady apparently of intelligence, testifies that she is about 55 years of age; that she knew Larkin Johnson and his then reputed wife, whose maiden name was Ann Shipley; that they lived upon her father's plantation in Maryland; that from the time of her first recollection of them they were living as husband and wife and were reputed to be married; that children were born to them while they were living on her father's place; that her father was a minister of the Gospel and would not have permitted them to live on his plantation had he known or understood that they were not married people. She further testifies

that she never heard a question as to their not being married suggested; that every one regarded them as being husband and wife for many years and up to the time of the death of the first wife.

A brother of Ann Shipley testifies that at the time, according to the understanding in the family, when Larkin Johnson was married to his sister, he was absent for a couple of years. When he returned they were living together as husband and wife, and it was the understanding in the family that during his absence they had been married by the father of Mrs. Blew, who testified in the case; that everybody in the family and everybody acquainted with them regarded and treated them as husband and wife; that no question as to the legality or validity of their marriage was ever suggested by any one to his knowledge; that complainant and her brothers, who are defendants in this cause, were the children of Larkin Johnson by cohabitation with his sister; that they were always regarded and recognized by both parents, during their lifetime, as legitimate children; that Larkin Johnson recognized him, witness, as his brother-in-law, until his death, which was some time after he had removed to this District and his intermarriage with the present widow.

Mrs. Blew in her testimony says that she never knew that either Larkin or his wife were slaves. But Shipley, the brother of the first Mrs. Johnson, testifies that Larkin was a slave and his owner emancipated him, his freedom to take place on his arrival at 30 years of age; that this marriage, according to his recollection, occurred a year or two before the freedom of Johnson.

So, taking the evidence altogether, we come to the conclusion that one of the parties was a slave and the other free at the time of the marriage.

In the case of *Green vs. Norment*, 5 Mack., 86, the question of the validity of slave marriages, where they were married according to any custom prevailing in the State where they lived, was discussed. In that case the court

was requested to say "that there was no proof on the subject of Charles Brooks' parents' marriage, and that the same may be said to apply to the grandparents of the plaintiff, William Brooks and his wife." Mr. Justice Cox, in delivering the opinion of the court, said: "On that subject there is proof that they lived here as free people for a number of years in the married relation, both William Brooks and his wife, and Charles Brooks, Sr., and his wife. Each one of the brothers lived with his reputed wife and were therefore reputed to be husband and wife. This is clearly competent *prima facie* proof to go to the jury of actual marriage between the parties."

"There was some attempt to prove by the declaration of Charles Brooks' wife that they had been married according to the custom of slaves in Virginia. But whether this was so or not, it may be disregarded. We have held in the case of Thomas *vs.* Reagan, that the fact that parties who had been slaves came to this District and lived as free people in the relation of husband and wife for some time, was evidence of actual legal marriage between them. So we think that there was some evidence of this marriage of William Brooks and Charles Brooks to go to the jury; and if that is so, then the instruction was properly rejected."

In the charge given to the jury, the judge said: "So that I instruct you that the evidence which has been admitted in this case is all competent under the issue made, which includes the declarations of the mother and grandmother of the plaintiff. That may be erroneous, but it was not excepted to at all; so that the questions of law are out of the case, and the only question is, whether, upon the whole, this evidence is sufficient to go to the jury to prove the legal relationship of the plaintiff and propositus."

"It is said that it is not sufficient, for this reason: admitting that it shows the relationship of the plaintiff to William Brooks, his grandfather, and the relationship of William Brooks to Charles Brooks, the father of the propositus, still there has been nothing proved as to the parents of

these two brothers; that is, it has not been proved that the common ancestors of the plaintiff and propositus, the grandfather and grandmother of the plaintiff, were ever married. If they were not married, of course, William and Charles Brooks being illegitimate, they could not inherit from each other, and the descendants of one could not inherit from the other. If they had been free white people, or free people of color, we think there is very good authority for the proposition that where two people recognize each other as brothers, and are shown to have done so at a period so remote that it is impossible to find living witnesses acquainted with their ancestors, the law will allow the jury to presume that fact, without which they would not be so related in law, viz., that their parents were lawfully married.

"*Eaton vs. Bright*, 2 Lee, Eccl. Rep., 85, 161, is a case where everything had been proved except the marriage of the grandfather and grandmother, and where it was shown that the children recognized each other as brothers and sisters, and the court said it would be presumed that their parents were married when the period was too remote to prove the fact by living witnesses.

"But it is said that these brothers were slaves, and, therefore, children of slaves; and that, as slaves could not contract marriage, there can be no supposition that the father and mother of William and Charles Brooks were ever married. On the subject of slave marriages, some light is thrown by the legislation of the State of Maryland and the decisions of the Court of Appeals. There is a statute of Maryland in 1777 which imposes a penalty on any clergyman who shall celebrate the rite of marriage between servants without the consent of their master; and in the case of *Jones vs. Jones*, 36 Md., 457, the court held that this act, by implication, made lawful the marriage of slaves with the consent of their masters; and although such marriage conferred no civil rights it did make the issue of marriage legitimate.

"Now, if the recognition of each other by two parties—

the mutual recognition of two parties as brothers—in the case of free people, would allow us to infer a lawful marriage between their ancestors, we do not see why we cannot indulge the same presumption as to slaves, and infer such a marriage between their ancestors as would be lawful—that is to say, a marriage with the consent of their masters.

“We think it just and proper to leave it to the jury to infer a marriage from the same state of facts as in the case of white people; so that if these people had come from Maryland, we would find no difficulty in saying that the fact that these two brothers recognized each other as brothers, was sufficient to go to the jury, as evidence that their parents who lived nearly one hundred years ago, were married.”

In the later case of *Millie Thomas vs. Holtzman*, (18 District of Columbia, page 65), in an opinion delivered by Mr. Justice Merrick, he said:

“It appears in the proof that Millie Thomas had for her husband one Henry Queen, a free colored man, and that she, being a slave, lived with him as her husband, recognizing the relations of husband and wife between them, with the consent of her master; and during that marriage two of these plaintiffs were the fruit of the union. The first husband died, and then, in a similar manner, she associated herself with another man by the name of Thomas, and lived with him, recognizing him as her husband, and that as the fruit of that union two other children were born. Her second husband subsequently deserted her at about the outbreak of the war and never returned, and, so far as it is known, is dead. These four children, the fruit of these two marriages, claim to be the heirs at law of Millie Thomas.

“It is objected on the part of the respondent in this case that the children of these marriages are not legitimate, first, because under the interpretation of the laws of Maryland, including the act of 1777, which recognize the capacity of a clergyman to perform the rites of marriage with the consent of the master, there was in point of fact no marriage; in other words, that by the law of Maryland recognizing

the possibility of a legal marriage under such circumstances *in facie ecclesiae*, with the consent of the master, any other marriage between slaves was not regarded as a marriage so as to legitimate the issue; secondly, that the act of Congress of February 6, 1879, which does legitimate or professes to legitimate all the issue of such marriages, is unconstitutional and void, because it makes a discrimination between persons of different races and different colors.

"In the first place, it is not at all apparent that it ever was the law that a marriage *in facie ecclesiae* was necessary for the purpose of legitimating the issue. It is true that the Court of Appeals of Maryland in the last four or five years has decided that such was the law; but that decision is not binding upon us. It is laid down by Blackstone that a marriage *per verba de presenti*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage.

"In the year 1844, that question was contested in the case of *The Queen vs. Millis*, 10 Clark & Finnelly, 534, and by a divided court the judgment of the Irish tribunal was sustained, which had affirmed that a marriage *in facie ecclesiae* was necessary to give legitimacy to the issue. That was, as we have said, by a divided court; and the opinion of Lord Campbell in the case, one of the ablest opinions that has ever been written, is a most powerful vindication of the ancient doctrine that a marriage, to be a valid marriage, so as to legitimate the issue, does not require the presence of a clergyman. He cites with marked emphasis and approbation the authority of Kent and Story as to the common law on this subject, certainly as it was uniformly understood in America.

"It is not necessary for us to decide that question at this time. What has been said is merely by way of suggestion, in order to repel the conclusion that it has been definitively settled that the presence of a clergyman is necessary to validate a marriage so far as the legitimacy of the issue is concerned. It is sufficient for this court to rely, for the

decision of the present cause, upon the act of Congress of 1879, which was made for the express purpose of relieving the unfortunate members of the late servile race from the consequences entailed upon them by their condition of servitude. The act of Congress is so emphatic and so comprehensive that it leaves no room for argument upon the question of the validity of the marriage now before the court. It provides:

“That the issue of any marriage of colored persons, contracted and entered into, according to any custom prevailing at the time in any of the States wherein the same occurred, shall for all purposes of descent and inheritance, and the transmission of both real and personal property in the District of Columbia, be deemed and held to be legitimate and capable of inheriting and transmitting inheritance, and taking as next of kin and distributees according to law from and to their parents, or either of them, and from and to those from whom such parents, or either of them, may inherit or transmit inheritance, anything in the laws of such State to the contrary notwithstanding.” 20 Stat. at Large, 282.

“That is as broad and comprehensive as language can make it, stating in terms that wherever, according to a custom prevailing at the time, the parties entered into and recognized themselves as occupying the relation of man and wife, it is sufficient for the purpose of legitimatizing the issue of colored persons. It was eminently proper and humane and just that the law should be made, and this court is unwilling to intimate the possibility of a doubt of the validity of the law in any respect. Certainly the suggestion that it violates any of the terms of the recent amendments of the Constitution of the United States can have no warrant or force in reason or law. The proof having been adequate to show in this case—without reciting it in delivering this opinion—that these people did live in the relation of husband and wife according to a custom then prevalent, and were recognized according to that custom as husband and wife, is sufficient to establish the legitimacy of the issue for the purposes of this cause.”

It will be noticed that this statute of 1879 is somewhat different in its terms from the statute which is to be found in the Revised Statutes of the District of Columbia, sections 724, 725, 726. It does not relate to persons who have lived in the District of Columbia, as does the statute found in the Revised Statutes of the District of Columbia, cited by counsel for the defendant to establish the contention that the statute only relates to persons who lived as husband and wife in the District, after they shall have first lived in some one of the States recognizing the institution of slavery, as husband and wife, according to the custom among slaves. Nothing of that kind appears in the more recent statute of 1879, quoted by Mr. Justice Merrick.

We think that there was a marriage in the State of Maryland according to the act of Maryland in 1777, and that there is such proof as that we may presume at this distance of time that such a marriage occurred. The evidence is very strong in that respect, much stronger than it was in the *Millie Thomas* case, stronger than it was according to the recitals in the case of *Green vs. Norment*, and more positive and direct, and much more satisfactory. But if this were not true, upon the doctrine laid down in the case of *Millie Thomas vs. Holtzman*, before quoted, we think that in the case of colored people, one or the other of whom was a slave, who have lived together as husband and wife for a long period of time and were reputed to be married and so treated and understood to be by their friends and the community in which they lived, for the purpose of inheritance it is to be regarded as a valid marriage. In this case the evidence shows that Larkin Johnson lived with his alleged first wife for many years after he became a free man, as her husband, during which time the fact of their marriage was never questioned.

Upon that theory of the law the evidence in this case is abundant to establish such a marriage as would entitle the parties in this case who claim to be heirs of Larkin Johnson by his alleged first marriage, to be adjudged legitimate and entitled to inherit.

The court below in this case dismissed the bill without prejudice, it is said, upon the ground that the proof was insufficient to establish legitimacy on the part of the plaintiff and her brother, parties to the suit. We do not concur in that opinion upon the authorities cited and the testimony disclosed by the record.

We hold that the proof is sufficient and the decree of the court below must therefore be reversed.

The prayer of the bill in this case is only that the sale recited in the bill and the deeds executed to the present widow of Larkin Johnson (since the death of Larkin Johnson intermarried with one Brown), be set aside, and also the deed of trust executed by her to secure a loan made by her after the sale should be set aside. The complainant does not ask for any further remedy. She does not ask that the property be again sold or that partition be made.

The proof does not show that the trustee to whom Mrs. Brown executed the deed of trust or that the beneficiary under that deed of trust had any knowledge of the alleged irregularities or wrongdoing at the sale, on account of which the sale should be set aside. The loan seems to have been made in good faith on the part of the creditor and the deed taken in good faith on the part of the trustee. She was apparently authorized to make the trust deed, because upon the record Mrs. Brown had a perfect title. We think we should not disturb that deed of trust. The record shows that the application of the proceeds of the loan was the extinguishment of a loan already existing upon the property, which all of these parties are under obligations to discharge. *The deed to Mrs. Brown will be set aside, and the sale will be set aside*, with the costs upon Mrs. Brown and her children, who are defendants in this cause.

An application was made here by Mr. Lyon to be made party complainant in the place of Mary Davis and something was said *pro* and *con*, as to his having purchased her interest and having purchased the interest of her brothers who were made defendants in the case. We were asked to

make some indorsement of that purchase, especially by making him a party to the suit in place of the original complainant. We understand that this application was made, so far as the complainant is concerned, in the court below, and was refused and it was renewed in this court upon the same statement, we presume, that was made in the court below. We are not inclined to grant that request. We leave the parties in that respect to pursue any remedy they may have hereafter by an independent suit. We leave Mr. Lyon to avail himself of any remedy which he may have under conveyances which he has, and without prejudice to the rights of any of these parties of whom he alleges that he has purchased an interest in this property to resort to any remedy that they think to be proper in order to set aside such conveyances if they shall claim that the purchase has not been made in good faith.

THE BALTIMORE & POTOMAC RAILROAD CO.

vs.

MARTHA HENNESSY ET AL., CONRAD
SCHAEFER, CHARLES SCHAEFER.

CONDEMNATION.

The court in General Term will not ordinarily give instructions in advance, as to how appraisers shall perform their duty in making valuations of land under condemnation proceedings.

At Law. Nos. 33,449, 33,450, and 33,451, consolidated. Decided January 16, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an application for instructions to appraisers as to manner of making valuations. *Overruled.*

The facts are stated in the opinion.

Mr. F. E. ALEXANDER for petitioner.

Messrs. ENOCH TOTTEN and WM. A. MCKENNEY for the railroad company.

Mr. Justice HAGNER delivered the opinion of the Court:

We have examined the application made in the matter of the Baltimore and Potomac Railroad Company *vs.* Charles Schaefer. The property of Mr. Schaefer has been surveyed and is claimed to be necessary for the uses of the railroad company. He applies to the court to give certain instructions, seven in number, to the appraisers as to the mode in which they shall perform their duty in making the valuation.

Ordinarily, this court, sitting in General Term, does not undertake to give instructions in such cases as this. There are general principles, which are well established, to govern the proceedings; and if there should be any departure from them the party who was injured can apply to the court to obtain redress.

In certain cases of great importance, particularly under statutes which seem to require such interposition, we have departed from this practice, and in advance have given instructions. Such was the case in the condemnation proceedings with reference to the site of the Postoffice, of the Congressional Library, and the Rock Creek Park.

We do not think any necessity is shown why we should give special instructions in advance in this instance, nor do we see that any harm will result to the parties from our declining to enter on their examination at this time.

One or more of them embody principles so well established that an assent to them in advance would scarcely have more force than their assertion before the jury by counsel on one side and the necessary admission of their correctness by counsel on the other.

In declining now to give any instructions, we are not to be understood as giving any intimation as to their correctness or incorrectness as they are now presented for our consideration.

The application is overruled.

THE UNITED STATES, ON PETITION OF COMMISSIONERS TO SELECT SITES FOR THE
ROCK CREEK PARK*vs.*GLEN W. COOPER AND CORNELIA O. TRUES-
DELL ET AL.

ROCK CREEK PARK ACT; EXPERT WITNESSES; WITNESS FEES.

1. Any person who has knowledge of a fact important to a party litigant, may be obliged to appear and testify to that fact.
2. When a person is summoned to testify, not as to a fact, but to give the result of his scientific knowledge, he is obliged to do so where his reasonable fees, beyond the common witness fees, have been tendered him.
3. Under the statute relating to the condemnation of land for Rock Creek Park (26 Stat. 492), a reasonable number of expert witnesses who testified before the Commission on behalf of the property owners, in reference to gold deposits, should be paid a fair compensation by the United States in addition to ordinary witness fees, such compensation to include reasonable mileage for traveling expenses actually incurred for attendance upon the Commission alone.
4. Practical miners who testified before such Commission as to gold deposits, and who, from long, careful observation, have derived special knowledge upon the subject, are expert witnesses and entitled to compensation as such.

District Court Docket. No. 366. Decided January 16, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an application for the allowance of additional compensation to expert witnesses, who testified as to gold deposits, to be paid by the United States. *Granted, and referred to auditor.*

The facts are stated in the opinion.

Mr. JAMES COLEMAN for petitioner.

Messrs. R. R. PERRY and C. C. COLE for the Commissioners.

Mr. Justice HAGNER delivered the opinion of the Court:

This is an application by Mrs. Truesdell, who was one of the lot owners in what is called the territory condemned for the Rock Creek Park. Her petition sets forth that in her attempts to prove the true value of her property, she summoned certain persons who were examined as experts to prove there was a gold deposit upon it, and that the United States examined witnesses as experts in opposition to that claim; that the property has been condemned and the money awarded has been received; that several of these witnesses have been paid at the rate of \$1.25 per day, although those remunerated in this way are really expert witnesses and their services were worth much more than those of ordinary witnesses; that they should be compensated on a different principle, and that according to law, and particularly under the proper construction of the statute under which the condemnation was made, it is proper the United States should make a sufficient allowance to enable her to pay them such compensation as should be properly paid to expert witnesses.

The last section of the Rock Creek Park statute declares the marshal shall provide suitable accommodations and summon such witnesses as may be desired by any party to these proceedings, and that the expense of service of summons, as well as the clerk's fee for issuing subpoenas and the attendance fees of witnesses, shall be paid by the United States as a cost incident to the condemnation.

It is stated the United States is willing to pay to all these witnesses, and has already paid some of them, the ordinary witness fees; but declines to pay this claim for their charges as experts: although some witnesses summoned as experts by the United States have been already paid at the rate of \$25 per day for their services, and in addition have received compensation for mileage; and the application insists a similar allowance should be made to these witnesses on behalf of the petitioner, to be paid by the United States out of the fund appropriated by the statute.

The question is a novel one here, and its examination

has involved a good deal of trouble and research. We find the law to be this:

The well settled rule is that any person who has knowledge of any fact important to a party litigant, may be obliged to appear and testify to that fact, whether he desires to do so or not. Bentham's illustration is, that if the Prince of Wales, the Archbishop of Canterbury and the Lord Chancellor when riding together should witness an altercation between a costermonger and an apple-woman, upon the summons of either party to bear witness as to what they had seen and heard of the transaction, they would be obliged to appear and testify as to the facts upon the same terms as ordinary witnesses. But the case is different where a person is summoned, to testify not as to facts, but to give the result of his knowledge upon a question of a scientific character involved in the suit. That is something which such person is no more obliged to communicate without compensation to a court or jury, than he is to give gratuitously to the general public the result of his erudition upon any subject involving research; for this is his own property, his stock in trade, which he can no more be required to present as a free gift to the public, than the merchant can be forced to surrender his goods at the bidding of a court, for the public benefit. Whether such a witness could be compelled to testify at all on such subjects, was at first a question of difficulty; but that was solved in favor of his obligation to do so, where his reasonable fees, beyond the common witness fees, had been tendered him. In *re Roelker*, 1 Sprague, Circuit Court U. S., 276. The next inquiry, whether the compensation was to be taxed as a part of the legal costs, has been settled in England, where special allowances are made as part of the costs, each party paying his own fees and then having them taxed as costs in the case. We have found no case in England where the losing party has been called upon to pay as part of the costs incurred by the victorious party, the moneys laid out by the latter in compensating his expert witnesses.

In this country, the entire subject seems to be unsettled; and in view of the conflicting decisions, it may be said to be undecided whether witnesses testifying as experts are generally entitled to have their compensation taxed as part of the costs. In some States there are statutes requiring such taxation, subject to the control of the court as to the amount; while in others there is an entire absence of legislation on the subject.

In Indiana such taxation is forbidden by a statute, passed apparently in consequence of a decision of its appellate court in a case where a physician, duly summoned, when required to give his opinion as to the probable course of a ball; being an anatomical question involved in a case of homicide, objected upon the ground that he had not been paid such compensation as was reasonable for his services as an expert, and payment not being made, he positively declined to testify. Having been committed for contempt of court, the Court of Appeals decided the committal was wrong and that he had the right to remain silent. *Buchman vs. State*, 59 Ind., 1; *U. S. vs. Howe*, Dist. Court of Arkansas, 12 Cent. L. J., 193.

In other States, as in Alabama (53 Ala., 389, *Ex parte Dement*), and in Texas (5 Texas App., 374; *Summers vs. State*), an opposite view is held. In a case reported in 104 Mass., 537, in the matter of Clark and the Attorney-General, two witnesses were summoned in behalf of a criminal, in a capital case, one of whom was examined as an expert and the other was not. The Court of Appeals there decided to allow a reasonable compensation to be paid out of the funds of the State, to be approved by the Attorney-General, holding that such witnesses ought to be placed in a different category from ordinary witnesses as to the amount of their compensation; and that, under the circumstances of the case (the Attorney-General submitting the whole question for the decision of the court), they were as much entitled to be paid a proper exceptional sum, as ordinary witnesses were to receive the usual *per diem* allowance.

In this jurisdiction and in Maryland, there is neither a statute, nor is there any decision on the subject.

The solution of the inquiry must be governed in a great degree by the Rock Creek Park statute itself.

That the United States has already paid its expert witnesses such extra compensation cannot be held to be conclusive on this subject. But we think that giving a reasonably fair and equitable construction to this statute, and bearing in mind that the United States cannot be supposed to be willing to take the property of the citizen without just and equitable compensation; that it is necessary its agents should be fully informed of all the constituents of value before it can be ascertained what would be such just and equitable compensation; there should be an allowance made for a reasonable number of such expert witnesses, summoned on the part of the owners of the land, in good faith; and that such allowance should include reasonable mileage for traveling expenses actually incurred for attendance on this commission alone. That is to say, if a man from Kansas, who had come to Washington on other business, were summoned before the commission, of course his mileage from Kansas should not be charged against the commission.

We think we ought to refer this matter to the auditor to take testimony on this subject and report to this court, and we will pass an order to this effect. We desire it to be understood that this ruling is so far governed by the terms of the Rock Creek Park statute that it is not to be considered as a decision on the general subject, apart from that statute. This reservation is important, as only the ordinary compensation of witnesses in this jurisdiction is provided for by law.

We also intend to be understood as speaking only of such experts as testified here in reference to gold deposits; and to none others. Such witnesses as testified only with reference to the general value of the land we conceive are not to be considered as experts.

The question of the proficiency and qualification of such

of the witnesses as are claimed to have been experts, is one with reference to which testimony will be taken before the auditor; and that will be reported for our decision with the other evidence he may take.

Upon the foregoing reference to the auditor, testimony was taken before him, and his report filed, to which exceptions were taken, and argued before the same Justices sitting in General Term as heard the original application. On April 1st, 1893, the following opinion was delivered.—REPORTERS.

Mr. Justice HAGNER delivered the opinion of the Court:

An application was made to us in behalf of Mrs. Truesdell to authorize payment out of the fund in court of certain amounts claimed to have been expended by her and of indebtedness incurred by her, in the employment of expert witnesses, to testify before the commission.

The particular point of inquiry before the appraisers at the time was whether or no there was an underlying stratum of gold on Truesdell's land; and if such was the case, what was its value. We passed the following order, which subsequently was enlarged so as to embrace a similar claim presented by Mr. Shoemaker: "Ordered, that the matters of said applications be and the same are referred to the auditor of this court, to ascertain and report to this court the names of any witnesses who were produced and properly testified as experts before said commission with respect to the existence or value of any gold-bearing quartz on said designated lots of land; that in making such ascertainment the auditor shall examine the record of the testimony of such alleged experts, as given before said commission and now existing among the papers of said commission, together with such other testimony bearing on this inquiry as may be produced before the auditor by said applicants or by the United States; but no compensation shall be made to any witness, called as an expert, who testified only to the general value of said land, or who was not qualified to speak as an expert by reason of special or scientific knowledge respect-

ing gold-bearing quartz or auriferous earth or gold-mining explorations; the competency of said witnesses to testify as experts to be hereafter considered by the court; that where any such witness testified on one day for one of said applicants or for any other person with respect to said subjects, he shall not be allowed for attendance as witness on such day for any other person; that the auditor shall ascertain by testimony to be taken by him what would be a reasonable compensation for the services of such expert witnesses *per diem*; that the auditor shall also ascertain and report to the court what would be a reasonable allowance by way of mileage or traveling expenses for any such expert witness in addition to the *per diem* allowance; but no such witness shall be entitled to such allowance for mileage or traveling expenses, unless he came on to Washington City expressly for the purpose of testifying as such witness in the Rock Creek cases, for the said applicants or one of them."

The auditor took testimony on these points in behalf of the claimants and of the United States; circumscribing the range of the examination within the lines laid down by the court in its order.

Among the witnesses adduced by the claimants before the commission were several practical miners, who, it was insisted, should be regarded as experts, although they made no claim to be ranked as scientists. One or two of the witnesses examined before the auditor, classed themselves as scientists. We think such practical miners are quite as likely to be correct in their opinions as to the value of "prospects," and perhaps more so, than the scholars, whose knowledge is exclusively or chiefly derived from books.

Rather an unsavory scandal in our public history resulted from people relying too much upon the testimony of scientists, as to the existence and value of deposits of precious metals in what was called the Emma Mine. In that case the promoters of the speculation relied with great confidence upon the opinion of Mr. Silliman, who bore a deservedly

great name in the scientific world. There was no reason to believe he was not acting honestly when he declared the mine was undoubtedly very rich; and yet the scientist proved to be in error, and the mine turned out to be practically worthless. On the other hand, the history of mining shows that gold and silver mines have been repeatedly discovered and their value accurately predicted, by men who could scarcely read and probably knew little or nothing of scientific metallurgy beyond the familiar names of the substances with which they were dealing. The discovery of gold in New South Wales in 1851 by an illiterate California miner, which added more than a million of gold to the world's supply, is an instance in point. Recently, instances are said to have occurred, where skilled miners have again and again, in the course of their explorations in our western country, found great treasures. Such "special knowledge," derived from long, careful observation, certainly rises far above the ordinary ability of the average of mankind, and marks its possessor as an expert, within the proper limitations of the rules of law on the subject.

The auditor, in a very painstaking way, has gone into a comparison of the pretensions of two of the claimants with the testimony on the part of the United States and of the claimants themselves, and has pointed out that the two claims conflict with each other, and that each is greatly in excess of what it ought justly to be. He has therefore reduced them to what seems to us to be reasonable limits, and we think his action is correct.

This case differs from the two cases just disposed of,* inasmuch as the lands of the claimants in the present case were actually taken by the Government; and in such cases only the act provides for the payment of "the expenses," which includes fees of witnesses; and we therefore have a right to assign a portion of the money in court for their payment. The auditor's report will therefore *be affirmed*.

* Applications of Wm. H. Hayden and Samuel P. Lee, reported herein at page 605.

HARRIET R. WEAVER, ADMINISTRATRIX DE BONIS NON
vs.
THE BALTIMORE AND OHIO RAILROAD
COMPANY.

TRANSITORY ACTIONS; FOREIGN ADMINISTRATORS; LIMITATIONS;
DISTRIBUTION.

1. The personal representative of a person whose death was caused by the negligence of another in a foreign jurisdiction, by the laws of which jurisdiction an action therefor is maintainable, may sue in the District of Columbia.
2. Under the act of Congress of Feb. 28, 1887, (24 Stat. 431,) a foreign administratrix may maintain such an action in this District as if she had been appointed here.
3. An administratrix taking out her letters in Maryland, but suing and recovering damages in this District by virtue of a statute of West Virginia, must make distribution according to the laws of West Virginia.
4. The act of Congress of Feb. 17, 1885, (23 Stat. 307) only applies to deaths caused in the District of Columbia, and the limitation of one year therein does not affect a suit brought for a death outside of the District by virtue of the statute of another jurisdiction, and in the absence of a statute to the contrary in this District, the limitation provided for in the statute under which the suit is brought, governs.

At Law. No. 30,710. Decided January 23, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an appeal by the defendant from an order sustaining a demurrer to a plea of limitations in an action for damages. *Affirmed.*

The facts are stated in the opinion.

Messrs. MORRIS & HAMILTON for defendant (appellant).

Messrs. R. B. LEWIS and B. S. MINOR for plaintiff (appellee).

Mr. Justice Cox delivered the opinion of the Court :

In this case the plaintiff, Mrs. Harriet R. Weaver, administratrix *de bonis non* of the estate of Cecil F. Weaver, who was her husband, under letters of administration taken out in Maryland, institutes this suit, in which she sets forth that on the 19th day of June, 1888, Cecil F. Weaver was in the service of the United States in the capacity of a railway postal clerk or employee, that the route to which he was assigned as such clerk or employee, and in which he was on duty was from the city or town of Grafton, in West Virginia, to the city of Baltimore, in the State of Maryland; that on the day in question he was in the discharge of his duty as such railway postal clerk or employee, and, with the knowledge, approval and permission of the defendant, was in the mail postal car in which the United States mail was then being transported, and of which he had partial charge, which was attached to and formed part of a train belonging to, owned and operated by the defendant, for the conveyance of passengers and persons from Grafton, West Virginia, to Baltimore, Maryland; that on the 19th day of June, 1888, while said defendant's train was proceeding from the said city or town of Grafton, to the city of Baltimore, and while said train was near Great Cacapon Station, in the State of West Virginia, and while said train was passing over the railroad bridge across which the railroad track passes, over the Great Cacapon Creek, in said State of West Virginia, the said Cecil F. Weaver, while in the discharge of his duties as a passenger in said train, and as such postal clerk, and without any want of care or negligence on his part, was killed, and his death occurred on said last mentioned day by having his head brought in contact with the timbers of said railroad bridge, and the plaintiff avers that the death of said Cecil F. Weaver, was caused by the wrongful act, neglect and default of said defendant and its servants and employees, in constructing, maintaining and keeping a railroad bridge and timbers thereof so near to the track and passing trains as to be dangerous to passengers transported thereon, and the said act, neglect or default was such as, if death had

not ensued, would have entitled said Cecil F. Weaver, for injuries received, to maintain an action to recover damages in respect thereof against said defendant.

The declaration sets forth the statute of West Virginia, which gives a right of action under these circumstances.

The defendant pleaded the general issue, and what is intended to be a plea of the Statute of Limitations, in these words:

"Second. And for a second plea, that the plaintiff's alleged cause of action did not accrue within one year before the institution of this suit."

Issue was joined on the first plea of the general issue. The second plea was demurred to. The demurrer was sustained, and an appeal taken from the order sustaining the demurrer, to this court.

The main question which it was intended to present was really what was supposed to be the defence of limitations; but inasmuch as the demurrer to the plea carries us back to the declaration, and also entitles the defendant to take advantage of any defect in the declaration, in setting out the cause of action, the question was made in the argument here as to the right of the plaintiff to maintain this action at all.

The case presented is that of an administratrix who took out her letters in Maryland, suing in this District for injuries received in West Virginia, and claiming under a statute of West Virginia. On the general question of the right of a party representing a deceased whose death was occasioned by negligence in another jurisdiction, by the laws of which jurisdiction the right of action is given, to maintain that action here, we think that the case of *Dennick vs. The Railroad Company*, 103 U. S., 11, settles the law for us.

That case grew out of an accident occurring in New Jersey on the Central Railroad, causing death. Letters of administration were taken out by the widow of the deceased in the State of New York, and the action was brought there. Objection was made to the right of the plaintiff to maintain

action there, and Justice Miller, in delivering the opinion of the court, laid down the broad proposition that "wherever by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

He cites the well known leading case of *Mostyn vs. Fabrigas*, Cowp., 161, which, it will be remembered, was a case in which action was brought by an inhabitant of the Island of Minorca against the Governor of Minorca, in England, for false imprisonment in Minorca. Lord Mansfield, in that case, said that an action of that sort is essentially transitory, and the action may be instituted anywhere.

The Supreme Court then goes on to maintain that there is no difference at all between the right of action existing at common law, and one created by statute.

This proposition of the court is broad enough to embrace this case, even if we had no law similar to that of West Virginia. The State decisions do not go to the same length as the Supreme Court on this general subject; but they also maintain the same doctrine, where, in the State where the remedy is sought, the policy is the same and the legislation is the same in character as in the State where the cause of action accrued and the right of action is given by statute. They hold that it is not at all necessary that the statutes in the two different States should be exactly the same. The only thing necessary is that the general policy of the two jurisdictions, and the principle of their legislation, should be identical.

The case of *Morris vs. The Chicago, Rock Island & P. R. R. Co.*, reported in 19 *American & English Railroad Cases*, 180, illustrates this rule. That is a case where the accident occurred in Illinois, and the suit was brought in Iowa. The plaintiff pleaded the statute of Illinois in his petition and made his proof that the deceased left a wife and parents surviving him. The court instructed the jury that

a recovery must be had as provided by the Illinois statute. They said: "In *Leonard vs. Columbia Steam Navigation Company*, 84 New York, 48, where an action was brought in that State against the defendant by an administrator for damages for a wrongful act causing the death of the intestate in the State of Connecticut, it was held that the action could be maintained. The ground of the decision is that, although the right of action does not exist at common law, but was created by statute, yet it was transitory in its nature and could be enforced in a foreign country where the laws of that country are of a similar nature. In other words, it is held that the action will lie unless the law and policy of the forum forbids its maintenance. The court said:

"The rule here laid down is just and reasonable, and does not ask that the statute should be precisely the same as that of the State where the action is given by law, or where it is brought, but merely requires that it should be of a similar import and character."

The court then cites the case of *Dennick vs. The Railroad Company*, 103 U. S., 11, and adds:

"It was held that the action could be maintained, and the decision is placed upon the broad ground that the action is transitory and may be maintained in any forum, and that the venue is immaterial. We think that it has been generally held that where a right of action accrues by virtue of a statute of any State, the action may be maintained in any other State, if not contrary to the public policy or law of the place where suit is brought."

We have, as is well known, a statute in this District which is almost identical with the West Virginia statute, the principal difference being that the duration of the right of action is confined here to one year, while under the West Virginia statute it is confined to two years. That makes no difference in principle. The principle of the two laws is identical; that is, that if death be occasioned by negligence, a right of action is given by the statute to the representative of the deceased, which is an innovation upon the common law. The same

policy prevails in both jurisdictions as to another question, and that is that the right of action should be limited in time. It makes no difference that the time is different under the two statutes. The policy of the two laws is exactly the same, and the principle at the foundation of them is the same.

So that, according to both Federal and State decisions, we think there can be no doubt of the right of a duly constituted administrator of a deceased person to maintain an action here to recover damages for the injuries set forth in this declaration.

There is a question made as to the right of the administratrix whose letters are derived from authority of the State of Maryland to maintain that action here. If the letters had been taken out in this District, the case would have been on all fours with the case of *Dennick vs. The Railroad Company*.

The act of Congress on this subject (24 Statutes at Large, 431) provides:

"That from and after the passage of this act it shall be lawful for any person or persons to whom letters testamentary or of administration have been or may hereafter be granted by the proper authority in any of the United States or Territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, *in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District*, and the letters testamentary or of administration, or a copy thereof, certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, had or have administration," &c., &c.

So that a foreign administrator, as respects any right of action, is put upon exactly the same footing as a domestic administrator, in this jurisdiction.

A question was suggested also as to whether the fact that

a different law of distribution might prevail in the different jurisdictions, would affect the question. That very objection was made in the case of *Dennick vs. The Railroad Company*, and it was met by the Supreme Court in the following language:

"But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the verdict for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute."

According to this principle, if the plaintiff recovers damages here, although she takes out her letters in Maryland, she would be bound to distribute the fund according to the law of West Virginia, and the courts of Maryland or this District would see that the distribution was made accordingly. Nor does it make any difference that she could not sue in Maryland, because under the law of that State, such actions were required to be brought in the name of the State. Her right to sue is given by the law of West Virginia.

We do not see, therefore, any difficulty on the part of the plaintiff in maintaining her action here.

The next question relates to the Statute of Limitations. The object of this plea will be seen by reference to our statute on this subject, found in 23 Statutes at Large, page 307, which provides:

"That whenever, by an injury done or happening within the limits of the District of Columbia, the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife to maintain an action to recover damages, the person who, or corporation which, would have been liable

if death had not ensued, shall be liable to an action for damages for such death."

The second section provides:

"That every such action shall be brought by and in the name of the personal representative of such deceased person, *and within one year after the death of the party injured.*"

It is to be noticed that this law applies only to deaths caused in the District of Columbia, and therefore is not applicable to the injury for which this suit is brought.

The question then is whether there is any act of limitations on that subject. In the case of "The Harrisburg," in 119 U. S., 199, which was an admiralty case, the Supreme Court, speaking of these statutes, say that the provision requiring the action to be brought within a limited time is not a mere act of limitation, but it is a restriction upon the right to sue at all, and that when the time expires the right of action anywhere is absolutely extinguished.

So that, in this case, if the law of any other jurisdiction had allowed suits of this sort to be brought within five years, yet this widow, going into that State from West Virginia, could not sue after two years. At that time her right of action would be gone absolutely, and the cause of action would be extinguished. But, on the other hand, it seems to me that if we had an act of limitations here, properly called an act of limitations, which forbade a suit of this kind, wherever the right of action had accrued, from being brought after one year, that would prevail against the statute creating the right of action, because no State can give a right of action which can be asserted at any time, in spite of a law of limitations of another State, which is a part of its *lex fori*.

But it is unnecessary to decide this question, because the act of this District, as I have already stated, does not apply to cases that have originated outside of the District.

If there is any act of limitations here at all, which will apply to this case, it is our general act of limitations under the Statute of Maryland, of 1715. If the husband of the plaintiff had not been killed, but had simply been severely

injured, and had brought this action, the form of his declaration would have been identical with this, except that instead of alleging his death he would have alleged simply the injury which he had suffered, and he would not have had occasion to refer to the statute of West Virginia, because his right to recover would have been a common law right. His declaration would have contained the same averments, viz., that he was injured without any want of care on his part, and that his injury was occasioned by the wrongful act and neglect and default of the defendants, its servants and employees, &c. It could not have been anything but an action of trespass on the case for injury, resulting from negligence. It seems to me in its present form it is nothing else than an action of trespass on the case. The plea is exactly the plea which applies to the form of action of trespass on the case—the plea of not guilty. If it is an action of trespass on the case, then, according to the statute of Maryland, the cause of action is not barred until three years after it accrues. The law provides that actions of account, *actions upon the case*, upon simple contract, book debt, or account, and said actions for debt, detinue and replevin for goods and chattels, and actions for trespass *quare clausum fregit* shall be brought within three years ensuing the cause of such action and not after.

If, therefore, there is any statute of limitations at all in this District to cover the present case, it would be the statute of Maryland, of 1715. If that does not apply to it, then there is no statute of limitations at all. In either view of the case, the lapse of time which is pleaded is not a bar to the bringing of the action. The demurrer was therefore properly sustained, *and the judgment of the court in that respect is affirmed.*

NOTE.—This case was subsequently tried on its merits and resulted in a verdict and judgment for the defendant. On appeal to the Court of Appeals, that court in an opinion filed June 4, 1894 (3 App., D. C.), affirmed the judgment of the court below.—REPORTERS.

ELLEN COSTELLO

vs.

THE DISTRICT OF COLUMBIA.

NEGLIGENCE; VERDICT; INTEREST ON JUDGMENTS IN TORT;
REMITTITUR.

1. Where the District of Columbia authorizes excavations in a public street so as to leave the street in an unsafe condition for pedestrians, the District at once becomes chargeable with the duty of seeing that proper safeguards are provided to prevent accidents. Therefore in an action against the District for damages alleged to have been caused by negligence in guarding a street, an instruction which directs the jury to find for the defendant unless they believe that it had actual or constructive notice by the lapse of time, of the insufficiency of such safeguards, should not be granted, *following* *McPherson vs. D. C.*, 18 D. C., 564; and *D. C. vs. Woodbury*, 136 U. S., 450.
2. Interest runs on all judgments in this jurisdiction, whether they are rendered in actions of contract or actions of tort.*
3. In this jurisdiction a jury has no right, in returning its verdict in an action of tort, to select an antecedent day at its discretion, and say that interest shall run from that day upon the amount of the verdict.
4. When such a verdict is returned, this court has a right to refrain from granting a new trial if the plaintiff will enter a *remittitur* of interest unlawfully allowed, but otherwise to grant a new trial.

At Law. No. 29,730. Decided January 23, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on a bill of exceptions taken by the defendant in an action for damages. *Judgment affirmed if remittitur for interest is entered, otherwise judgment reversed.*

The facts are stated in the opinion.

Messrs. G. C. HAZLETON and S. T. THOMAS for defendant (appellant).

Messrs. MORRIS & HAMILTON and M. J. COLBERT for plaintiff (appellee).

* Overruled by *W. & G. R. R. Co. vs. Harmon's Admr.*, 147 U. S., 571.

Mr. Justice HAGNER delivered the opinion of the Court:

This is an action brought against the District of Columbia by Ellen Costello, a young woman who, in 1888, was a servant at the Riggs House. She testified that on the day of the accident she went down into the southwestern part of the city to see her mother, and returned about half past 10 o'clock at night. She got out of the F street car, on 14th street, just where that street crosses the south side of G street. She then undertook to walk from the car westwardly to the Riggs House, and fell into a ditch between the car track and the pavement. She then became insensible, and knew nothing further until she found herself in bed at the Riggs House. Her leg was broken, and a very serious injury resulted to her, the effects of which are such that one limb is four inches shorter than the other. The jury rendered a verdict for \$7,500, with interest from a designated day, in her favor.

There were various exceptions taken at the trial, but there were really only two questions presented, as we conceive, which we need notice.

At the time spoken of the District of Columbia was engaged in laying a large water main down 14th street from a point beyond K street, south to the Avenue. They were working on this water main, in sections, one of which extended from F street to the south side of G street. The excavation was quite near to the western pavement, and was at least six feet deep.

It appears from the intelligent testimony of Captain Lusk, who represented the District upon the work and had general direction of it, that all the dirt was thrown on the west side of the excavation, almost in contact with the pavement; and this was regarded as a sufficient barricade upon that side. The only barricade on the eastern side of the ditch consisted of a line of pipes, about thirty inches in diameter, which were to be placed in the ditch. These pipes were placed along in close connection from F street up to a point about 18 feet from the south side of G street. There the pipes

seem to have given out, and thence up to the south side of G street there were no pipes at all. The only pretence upon the part of the District of any barricade there, is that some barrels of cement were placed at intervals along this space, with boards extending from one barrel to the other, and with heavy pieces of concrete broken from the pavement placed on top of the boards to keep them in position; and that red lights, indicating danger, were placed along there, as well as along the whole line. There is some evidence there was a barricade across the north end of the excavation, consisting of a plank laid across two barrels; and the northern end of the ditch was crossed by a little bridge for foot passengers, consisting of one or two planks. But there is really no actual evidence of any barricade at all for that 18 feet, although the fact that Captain Lusk directed his agents to place such a barricade there is undoubted. There was an electric light at the corner, but the testimony is that the night was dark and rainy, and that no light was burning there at the time of the accident.

The person whose special business it was to watch this place is dead; and, it is said that two others who were more or less engaged in close connection with this work, are also dead; which will account for the scarcity of testimony on the subject.

Two witnesses employed at Mr. Small's florist establishment, right across the street, say that they were quite familiar with the place; that they crossed there several times on the day of the accident, and at no time was there a barricade there during that day. A policeman who was examined, says he complained of the unprotected situation, and protested it was not proper to leave the excavation in that condition.

Upon the whole case we have no hesitation in saying the jury were perfectly justified in finding there was negligence on the part of the corporation. In our opinion, it was a case of most reprehensible negligence. Instead of one poor girl being maimed for life, dozens of persons might have

been injured that Sunday night; and if there were churches in the immediate vicinity, there was nothing to prevent any number of persons from falling into this excavation.

As soon as the accident occurred and people began to gather at the place, planks were put up along the ditch. One witness for the defendant testified that the planks he saw there the next morning were not the planks to which he alluded as having been put there about 5 o'clock on the previous evening; that the first set of planks were much thicker than those found there the next morning: a statement which conclusively showed, either that no planks at all had been placed there the night before, or that the alleged watchmen had neglected their duty.

The case was tried upon instructions which were almost identical with those granted in the case of *McPherson* against the District of Columbia, reported in 18 D. C., 564. In that case a girl crossing the street diagonally from the southeast corner of the postoffice, fell into a ditch which had been made by a heating company, having permission from the District authorities to make excavations in the streets to lay its pipes. The defence by the District was, that the heating company had maintained a sufficient barricade up to a short time before the girl fell, but that in some way or other it had been removed; and that the burden was upon the plaintiff to show the defendant had notice of its removal. The court rejected this contention, and instructions were given, upon which those in the present case were framed.

This question was also considered in the case of *District of Columbia vs. Woodbury*, 136 U. S., 450. In that case, a person passing along by Riggs Hotel, on this same G street, stepped on the edge of a mortar board which had been placed over a manhole leading down through the pavement into the boiler room. The board tilted with him; he fell, and he was seriously injured for life. The defence was there interposed that some one must have removed the mortar board, and that after the builders had put an obstruction there, their duty was discharged and it was not incum-

bent upon them to employ a watchman to remain by it, to prevent its removal. The court held the builders, at their peril, should see to it that they had put a perfectly efficient protection at the place in the first instance; and that the mortar board, which was capable of being easily displaced by passers by, was not such sufficient protection.

As a matter of course, it is utterly impossible there could have been an efficient barricade at this place when the plaintiff fell into the excavation. If there had been she could not have gotten in the ditch, unless she had climbed over or under the barricade, or pushed it away; and there is not the slightest evidence of any such act.

It seems to us the instructions of the court are not liable to any of the objections made against them.

There is really only one objection in the case, and that is as to the form of the verdict. The jury, says the record, retired, and subsequently returned their verdict against the defendant for \$7,500, with interest from May 27, 1889.

Exactly where the jury could have gotten the date of May 27, 1889, does not appear. It was neither the date of the accident nor of the impetration of the writ. This is an action of tort, and the question arises whether we can affirm a judgment rendered in that form in an action of that description.

The question is somewhat akin to one which has been litigated here more than once, whether a judgment *in tort* bears interest from its rendition in this jurisdiction. We have held, and have thus far seen nothing to change our opinion, that interest does run properly upon all judgments, in this jurisdiction, whether they are rendered in actions of contract or actions of tort. We have nowhere decided, nor have we seen any authority to justify us in deciding, that the jury had the right, in returning their verdict in an action of tort, to select an antecedent day at their discretion, and say that interest should run from that day upon the amount of their verdict.

Sedgwick, in his work on Damages, Vol. 1, section 320, discusses the question of interest on verdicts in cases of

tort, and after showing that in certain cases interest may be recovered in such actions, says: "The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless, it is in the region of tort that we find the clearest cases for the disallowance of interest. There are many actions of tort which are not brought to recover a sum of money representing a property loss to the plaintiff; and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such cases as assault and battery, or for personal injury by negligence, libel, slander, seduction or false imprisonment. But where the tort is of a sort to deprive the plaintiff of property, although not (as in the case of conversion) taking away his title to any specific thing, interest is frequently and perhaps generally allowed."

In the *Western & Atlantic R. R. Co. vs. Young*, 81 Ga., 397, the court below, on the request of the plaintiff, told the jury that in rendering their verdict, they might return interest upon the amount which they found. On appeal it was held this instruction was wrong; and one of the reasons assigned as having some weight,—though its force may be questioned—was that the principle of tender applied equally to all cases; and a defendant has the right to save interest and costs by tendering the amount due into court. But as it would not be practicable to tender any particular sum or the amount due, in an action for unliquidated damages for a personal injury, inasmuch as it would be impossible to predict what sum the jury would award, if they had the right to return interest on their verdict from an arbitrary date the defendant's legal right to make the tender would be impaired.

After careful consideration, we think the judgment below cannot be allowed to stand in its present form. It is quite a generous verdict, but with that we have no complaint to make under the circumstances. It is rather unfortunate that

the negligent officials who bring these troubles and sufferings upon citizens, may perhaps go scot free, as not being responsible to pay any portion of the damages. They suffer vicariously through the property holders, the Justices among others.

The next question is whether we shall reverse the ruling below, or whether we can modify the verdict, by declaring that although the verdict in its present form was unauthorized, yet if the plaintiff will enter a remittitur of the interest, we will refrain from granting a new trial: and as authority to do this has been questioned, we have examined this question anew without relying only upon our own practice. We have no difficulty in saying the appellate court has this power. In 1 Sellon, 482, the author says, a remittitur may be entered after error brought, where the verdict exceeds damages claimed.

In Bank of Commonwealth of Kentucky *vs.* Ashley, 2 Peters, 327, the Supreme Court carefully examined this question, and decided in favor of its authority as an appellate court to adopt this course, following the case of Arcambel *vs.* Wiseman, 3 Dallas, 306. In the latter case a counsel fee had been improperly included in the judgment, and the Supreme Court required it to be released by a remittitur. In Russell *vs.* Place, 9 Blatchford, 173, a similar ruling was made. See also Sinclair *vs.* Railroad Company, MacArthur & Mackey, 20; Sedgwick on Damages, section 1322.

In the more recent case of Flannery *vs.* B. & O. R. R. Co., 4 Mackey, 111, this court took the same course; and in that case they exacted a remittitur of the larger part of the verdict, under penalty of granting a new trial

In the present case we give notice, we will grant a new trial unless there is a remittitur for this interest. When such remittitur is entered, we will affirm the judgment below.

THE UNITED STATES
vs.
FERDINAND LOWENSTEIN.

RECEIVING STOLEN GOODS; INTENT; EVIDENCE.

1. An indictment for receiving stolen goods under our statute must set out that the accused received the goods, knowing them to be stolen, with the intent to defraud the owner thereof, and this intent must be proved; but it is not essential that the prosecution should prove such intent by positive testimony.
2. In such a prosecution the trial court may properly instruct the jury, if they should find the accused knew the goods were stolen when he received them, the intent to defraud the owner could be gathered from the circumstances surrounding the case; that it followed as an inevitable presumption in the absence of any proof to the contrary, that he received them with the intent of defrauding the owner.
3. It is proper for the trial court in such a case to explain to the jury the effect of revelations in the evidence subsequently adduced, tending to show his bad character, upon previous testimony as to the good reputation of the accused.
4. A bill of exceptions should not include all the evidence upon points about which there is no controversy; and when the trial court in charging the jury, comments upon evidence not set forth in the bill of exceptions, and the record does not disclose any objection made at the time to such comments, an appellate court will presume the testimony referred to was before the jury.

Criminal Docket. No. 17,596. Decided January 23, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an appeal by the defendant from an order overruling a motion for a new trial, in a criminal prosecution. *Judgment affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. COOK & SUTHERLAND for defendant (appellant).

U. S. DISTRICT ATTORNEY for the United States (appellee).

Mr. Justice HAGNER delivered the opinion of the Court:

This indictment contained three counts charging the defendant, Ferdinand Lowenstein, with receiving certain

stolen property, knowing it to be stolen; namely, a silver vase of the value of \$100, which, in the third count, was laid as the property of Malcolm Seaton, administrator of his father, William W. Seaton, with intent to defraud the said Malcolm Seaton, administrator.

In July 1889 a verdict of guilty of receiving stolen property under \$35 in value was found under this count; and not guilty, under the other counts. On the same day the defendant was sentenced, and an appeal taken to the General Term from an order overruling a motion for a new trial.

The attorneys who conducted the case up to that point seem then to have abandoned it; and two years afterwards, in July, 1892, a bill of exceptions was signed at the instance of counsel who argued the case before us, but who had no connection with the case originally.

Only a few of the numerous objections presented in the brief were argued, the others having been abandoned by counsel.

The first exception was taken to portions of the charge of the Justice below; and the second, to certain utterances of the court, afterwards, apparently in reply to questions by counsel as to the meaning of certain remarks in the charge.

1. It is insisted there was error in the following language in the charge: "Practically the only fact for you to ascertain and determine in this case is whether this stolen property was received by the defendant with the knowledge that it was stolen, and that it was received with the intent to defraud the owner. As to the last element of the offence, you need not be concerned about that, for if you find that he received it with guilty knowledge, the other would necessarily follow; and the intent is not material, if you find that the goods were stolen and were received by the defendant, with the knowledge that they were stolen. So that, I have said, practically the only important question of fact for you to determine is whether the defendant in this case received this stolen vase with the knowledge that it was stolen."

In the supplemental charge, there appears this similar statement:

"The intention is not material if they find the guilty knowledge."

It is now insisted it was requisite to charge in the indictment that the vase was received with an intent to defraud the owner, and equally necessary to prove that intent; and that the Justice erred in informing the jury if they found guilty knowledge in the defendant, that would be sufficient, without further proof that the property was received by him with intent to defraud the owner.

We think the court, in these paragraphs gave the jury effectively a correct statement of law. In Roscoe's Criminal Evidence, page 895, 8th edition, the author says:

"The intention of the party is not material, provided he knew the goods to be stolen." *Rex vs. Davis*, 6 C. & P., 177. In *Rex vs. Richardson*, 6 C. & P., 335, where it appeared the property was received only for concealment, without profit, the court held, it was not necessary, as in larceny, that the offence should be *lucri causa*. It is enough if the object be to shelter or accommodate the thief. And an intent to get by the receiving a reward is *a fortiori*, sufficient to satisfy the statute. I Wharton Criminal Law, Sec. 988.

Mr. Bishop says it is not necessary the receiver should act from motives of personal gain: if his object is to aid the thief it is enough; nor is it material whether a consideration passes between the receiver and the thief; the intent must be in some way fraudulent or corrupt.

In 2 East's Crown Law, 765, Chap. 16, Sec. 163, it is laid down:

"It is sufficient if the goods be in fact received into the possession of the accused in any manner, *malo animo*; as to favor the thief; or without lawful authority, express or implied from the circumstances."

It is a curious fact that the law in England on this subject received a great modification from the determination to bring to punishment the notorious Jonathan Wild, whose exploits are made the subject of one of Fielding's novels. After breaking the laws in various ways, he finally opened

a resort in London, to which thieves would bring stolen goods informing him of the name of the owners; with whom he would negotiate to surrender the goods for a reward, which he divided with the thief. As long as the receiver of stolen goods was prosecuted only as an accessory of the thief, there could be no conviction of the receiver until the principal had been convicted. The frequent escape of the receiver, on this account, rendered it necessary to make the act of receiving an independent offence; and under that statute passed to meet the previous acquittals, Wild was convicted and executed.

It is true the indictment under our statute must set out that the accused received the goods, knowing them to be stolen, with the intent to defraud the owner thereof; and that this intent must be proved. The familiar principles governing the manner of proof are thus stated in 3 Greenleaf, Sec. 13:

"Another cardinal doctrine of criminal law, founded in natural justice, is that it is the *intention* with which an act was done that constitutes its criminality. The intent and the act must both concur, to constitute the crime. *Actus non facit reum, nisi mens sit rea*. And the intent must therefore be proved, as well as the other material facts in the indictment. The proof may be either by evidence, direct or indirect, tending to establish the fact; or by inference of law from other facts proved. For though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty, yet it is a rule equally sound that every sane person must be supposed to intend that which is the ordinary and natural consequence of his own purposed act. Therefore, 'where an act *in itself indifferent*, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is *in itself unlawful*, the proof of justification or excuse lies on the defendant, and in failure thereof, the law implies a 'criminal intent.'"

Sec. 14. "This rule, that *every person is presumed to*

contemplate the ordinary and natural consequences of his own acts, is applied even in capital cases."

Sec. 18. "*But in the proof of an intent to defraud a particular person, it is not necessary to show that the prisoner had that particular person present in his mind at the time; it is sufficient if the act done would have the effect of defrauding him; for the law presumes that the party intended to do that which was the natural consequence of his act. Thus, where on an indictment for uttering forged bank notes, with an intent to defraud the bank, the jury found that the intent was to defraud whoever might take the notes, but that the prisoner had in fact no intention of defrauding the bank in particular, the conviction was held right; for it is an inference of law, that the party, in such cases, intended to defraud the person who would have to pay the bill or note, if it were genuine.*"

So that although it is necessary to set out the intent in an indictment, if required by the statute, yet it is not essential the prosecution should prove such intent by positive testimony, as by the actual admission of such motive by the party. Where a man is indicted for assault with intent to kill, it is scarcely to be expected the accused will admit the existence of such intent. On the contrary, he will positively deny all thought of taking life. But the intent may nevertheless be satisfactorily established by the circumstances of the case, as from the lethal character of the weapon used, and the savage or malicious manner in which the attack was made. In the case at bar, although it was necessary to allege and also to prove to the satisfaction of the jury, that the defendant received the vase with intent to defraud the owner, yet the court properly told the jury if they should find the accused knew the goods were stolen when he received them, the intent to defraud the owner could be gathered from the circumstances surrounding the case; as from his conduct, and his own evidence as well as that of others; for it followed as an inevitable presumption in the absence of any proof to the contrary, that he received it with the intent of defrauding the owner.

We have examined the cases cited by the counsel of the traverser upon this point, and all other authorities accessible, and find no support for his contention. In several of them it was held that under a statute similar to ours, the averment of the intent to defraud should appear in the indictment; but nothing further; and the indictment before us conforms to this requirement.

2. It is said, next, that portions of the charge referring to the testimony as to the reputation of the accused were incorrect and injurious to the defendant. This part of the charge was as follows:

"The court tells you also, as in all criminal cases, that evidence of good character—character for honesty and integrity—is to be considered, no matter what the charge is, and no matter how strong the direct proof may be apparently, in any case; but you are to receive such evidence of good character as you would all the other circumstances of the case and the other evidence in the case, and treat it as your good judgment, as men, would suggest. * * * Now, if I go into a store to make a purchase, for instance, and I put down a five dollar bill, and I receive change as if I had put down a ten dollar bill, and I take that and go out, with the knowledge of the mistake, there is no doubt in the world that I have committed larceny. So that, while it is perfectly proper and right, where parties deal at arms' length and upon equal footing, to buy at as low a price as they may or can, with the view of selling at as much as they can, yet if there is a knowledge of the value or weight which exists within the breast of only one party, and a representation is made upon the basis of an entirely different fact,—that is, upon an entirely different estimate of weight—you are to judge whether that would be the act of an honest man; and as against reputation you may take evidence of such dealings as this, in order to ascertain whether the party upon trial is really a man of honesty and integrity. Still, a man who is dishonest, and who is not a man of integrity, may act honestly. A man who would drive a hard or dis-

honest bargain may, of course, be a party to a perfectly innocent transaction."

We think this embodied a correct statement. There may be a vast difference, as we know, between a man's reputation and his character. A man's character represents what he is. His reputation is what people have hitherto supposed him to be. If the persons whose frauds frequently astonish the country had not previously enjoyed good reputations, they would not have been appointed to positions of trust which gave them the opportunity to defraud. Their reputation was better than their character.

If an accused person produces respectable witnesses who testify strongly to his fair reputation, the evidence will properly have weight with the jury as evincing the high improbability that a man with such a reputation could have committed a disgraceful crime: and the argument is so strongly pressed upon a jury, that the positive opinion of witnesses as to reputation may frequently be allowed more than its just weight. Against misunderstandings on this point the jury may well be warned. For, if the accused should afterwards admit on the stand his association with gamblers and lewd and disorderly persons and common thieves, the jury ought properly to conclude that his witnesses had been mistaken as to his character, however sincere may have been their estimate of his general reputation. And it was quite proper in the judge to explain the effect of such revelations upon the previous testimony.

But it is contended that even if these statements of the court were correct, standing by themselves, all this branch of the charge became censurable because of the introduction of the following paragraphs, which the counsel insist misstated the evidence of Lowenstein to his evident injury:

"You are to take such evidence, for instance, in connection with the admitted testimony of the defendant upon the stand, that when he weighed this vase in his hand he estimated it to be twenty-five ounces in weight, and that he then willingly and willfully purchased it from the thief—he

did not admit that he knew him to be a thief, and I do not mean to intimate that—but he purchased it, and said that he allowed him at the rate of sixteen ounces and sixty cents an ounce.”

And again,

“I do not mean to intimate that this—which I should characterize as a dishonest transaction, and I think any honest man would; that is, purchasing at sixteen ounces when he knew it weighed at least twenty-five ounces—should be received by you as a circumstance indicating that he bought the vase with guilty knowledge; yet I say you may offset that circumstance against the general evidence of character from the witnesses who testified as to reputation.”

For proof that these sentences incorrectly set forth the testimony, we are referred to a statement in the record of Lowenstein's examination, which contains no statement that he testified he had weighed the vase in his hand, or that he estimated its weight at twenty-five ounces, or that he bought it for sixteen ounces.

It is not asserted before us as matter of fact that Lowenstein did not so testify; for the prisoner's counsel admits he had no knowledge of the subject, as he was not present at the trial, and has no information to the contrary. But the absence of such language from the brief statement in the record of Lowenstein's testimony, is relied on as sufficient evidence that the statement of the court was unauthorized. It is to be considered, however, that the record does not purport to contain all the evidence in full, but only an abbreviated statement. Thus with respect to the first witness, it is said, “The United States called as a witness Malcolm Seaton, who testified, in substance, as follows:”

And there is no statement in the record that it contains all the evidence given at the trial.

The question, therefore, is, whether we shall conclude the justice below made statements of the evidence completely at variance with the facts; and upon this assumption shall reverse the judgment, and award a new trial.

We think the law governing this question is very well laid down in the case of the Grand Trunk Railroad *vs.* Ives, 144 U. S., 408. There was no evidence in that record that the deceased left a dependent family; and as no right of action under the law of Michigan could arise for the negligent killing of a person by a railroad company unless it appeared the deceased left some one depending upon him for support, the defendant insisted the appellate court was bound to reverse the judgment below on this ground.

But the court declared no question concerning this phase of the case could arise upon the record; although it was true it did not embody any such evidence. Continuing, the court said:

"We should bear in mind, however, that it is not for this court to say that the entire evidence in the case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exceptions, viz.: that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties in the case, and which may relate to exceptions noted at the trial. A bill of exceptions should not include, nor, as a rule, does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it is necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature. If such evidence be admitted without objection, and no point be made at the trial with respect to the matter it was intended to prove, we know of no rule of law which would require that even the substance of it should be embodied in the bill of exceptions subsequently taken. On the contrary, to encumber the record with matter not material to any issue involved, has been repeatedly condemned by this court as useless and improper.

"But as the record fails to show that any exception was taken at the trial based upon the lack of any evidence in this

particular, we repeat, it is not properly presented to this court for consideration. If the defendant deemed that the court below erroneously made no reference in its charge to the jury to the lack of any evidence in the record respecting the existence of any beneficiaries of the suit, it should have called that matter to the attention of the court at the time, and insisted upon a ruling as to that point. Failing to do that, and failing also to save any exception on that point, it must be held to have waived any right it may have had in that particular."

Is it possible to believe that the court below, in the case before us, in the presence of Lowenstein and his counsel, who must be presumed to have been listening to the charge as it was their duty to do, could twice have made an incorrect statement of Lowenstein's testimony without any support in the facts; that the statement could have been allowed to pass unchallenged, and that they would have acquiesced in its correctness, by their silence? That the counsel was alert as to his duty in this respect appears from the fact that at the close of the charge he at once called the court's attention to other statements in the charge he thought required correction; and four paragraphs in the supplemental charge contain the court's replies in this colloquy to these questions of counsel. Would not a similar correction have been reported if the court's statement as to Lowenstein's testimony had been incorrect, and would not such alleged misstatement have been made one of the grounds for a new trial? But we have examined the motion for a new trial made immediately after the verdict, and find it contains no intimation that the court's statement of the testimony of Lowenstein was incorrect.

In *United States vs. Briggs* (19 District of Columbia, 585), counsel for the prisoner, in his argument before the jury, made a statement as to the testimony of one of defendant's witnesses, which the district attorney denied. The prisoner's counsel insisted the witness had so testified, and the district attorney appealed to the presiding justice,

in support of his denial, and the justice replied he had no recollection of any such testimony in the case. The prisoner was convicted, and on motion for a new trial, it appeared by several affidavits that the witness had undoubtedly so testified; that one of the prisoner's counsel had so recorded his evidence on his notes at the time; that the senior counsel thinking the remark of the court was a positive ruling against him, concluded it would be wiser to say nothing further on the point, and acquiesced. The motion for a new trial was overruled, and the case was brought here on appeal, and the judgment below reversed upon this point.

In the course of the opinion, we said:

"The defendant's counsel declare they considered this intimation of the court as a direction that this line of argument would no longer be allowed. We cannot forbear saying that under the circumstances the counsel for the defendant was to blame in abandoning the point; for he had the right at the time in a proper manner to insist that his recollection of the testimony was correct; and to ask that the witness should be recalled; and to appeal to the recollection of the jurors to support his statement. Representing as he did his client's most precious interests, he should have pressed the point in one of the methods indicated; and that the court would have assisted him in doing so we cannot doubt; but if the justice should have still refused his motion, then, according to several cases cited by defendant's counsel, the appellate court could have reviewed such refusal on exceptions."

As we have stated, this bill of exceptions was brought to the trial justice for signature two years after the case was tried. The counsel on both sides have changed since, and the record, including the brief statement of the substance of the testimony and the charge, is all that is certain in the case. Upon this showing we are satisfied the jury were justified in their verdict, and that there is no error in the rulings of the court below.

The judgment of the court below is affirmed.

ALICE M. BOSWELL BY ROBERT S. BOSWELL

vs.

THE DISTRICT OF COLUMBIA.

ESTOPPEL; VARIANCE; INCONSISTENT INSTRUCTIONS.

1. When, in an action against the District to recover damages resulting from an accident due to the defective condition of a gas box placed by a gas company in a public sidewalk, the gas company is brought into the suit by notice, and assists in the defence, it will be estopped from thereafter disputing any fact on which the judgment is founded.
2. Where the declaration in such a case avers that plaintiff was injured by stepping into a hole in the street or sidewalk, it is error for the trial court to instruct the jury that it was not necessary for plaintiff to step bodily into the hole, but that if she struck her toe against a projection above the sidewalk, that would be getting her foot within the hole, and the averment of the declaration was satisfied by that evidence.
3. The rule is that where instructions are inconsistent, the court cannot tell which one the jury followed, and if there is error in either, there must be a new trial.

At Law. No. 29,157. Decided January 23, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing upon an appeal by the defendant from an order overruling a motion for new trial in an action for damages.
Judgment reversed.

The facts are stated in the opinion.

Mr. G. C. HAZELTON for defendant (appellant).

Messrs. R. ROSS PERRY and E. B. HAY for plaintiff (appellee).

Mr. Justice COX delivered the opinion of the Court:

This is a case brought to recover damages for injuries suffered by the plaintiff from getting her foot into a hole in the sidewalk and being thrown down, in consequence of which she suffered a fracture of the thigh. There are two

counts in the declaration; one alleges that the plaintiff was going along C street south, between First and Second streets east, in the city of Washington, in the District of Columbia, and that the said street was carelessly and negligently suffered by the defendant to be and remain defective and out of repair; that on the 5th day of May, 1888, while passing along and over said street and using due care, plaintiff accidentally stepped into a hole in said street, caused by the sinking of an iron gas box below the level of the sidewalk, and was thrown violently to the pavement and sustained a transverse fracture of the thigh bone of her right leg, and was otherwise greatly hurt and injured. The second count simply describes the accident as being due to her accidentally stepping into a hole in the sidewalk, without giving any further or more definite description than that.

A plea of not guilty was filed, and the trial resulted in a verdict for the plaintiff. A motion was made for a new trial on the usual grounds, including exceptions taking to the rulings of the court during the progress of the trial, and to several portions of the charge, and the case comes here on appeal from the order overruling that motion.

The gas box which is described in the first part of the declaration is presumed to be a part of the works of the Washington Gas Light Company, and if the District should be compelled to pay damages to the plaintiff resulting from a defect in that work, which was properly under the care and control of the Gas Light Company, the District would have the right to an action over against the Gas Light Company for indemnity, and for that reason the Gas Light Company was brought into this suit by notice, and assisted in the defence. Under the rule laid down in the case of *Robbins vs. Chicago* (4 Wall., 657), that makes the Gas Company a party to this suit for the purpose of being bound by any judgment rendered in the suit, and it will be estopped from disputing any fact on which that judgment is founded.

Of course, the plaintiff has no interest in this abeyant controversy between the District and the Gas Light Com-

pany; but both the nominal and the real parties defendant were quite interested in having the actual cause of the injury here definitely ascertained, if possible. They were interested in seeing that the rules of evidence were not relaxed in favor of the plaintiff, and that there should be no variance between the proof and the declaration and no verdict allowed, founded upon evidence which was variant from the declaration.

It is proper for a moment to glance at the evidence in this case, in order to understand the instructions that are complained of. The gas box is a few inches distant from the railing which encloses the parking. It was originally at the curb, but when the sidewalk was widened it remained in the same place as before, and was brought within some eleven inches of the railing around the parking.

I will take one witness on each side, who seemed to give a pretty clear idea of the cause of this accident. The first one is James N. Fitzpatrick, who says:

"On the west side the gas box projects a half inch above the bricks. On the east side there are two bricks that rise in an angle, probably, I do not know about what; but the height of them above the box is about half an inch; one whole brick projects up above that, and the other is a half-brick."

On cross-examination, he said:

"The gas box on the west side is about half an inch above the level of the sidewalk. On the east side there are two bricks projecting half an inch above that. So that you may call it a hole or protuberance. It was flush on the north side and on the south side with the sidewalk, and on the east side, everywhere but on the west side."

A witness for the defence, who went there and measured the box, testified:

"I examined the gas box. It projects on the west side three quarters of an inch above the pavement. On the east side and north, it is flush with the pavement. On the south side the brick work is about a quarter of an inch above the box. The projection on the west side is a depression in

the sidewalk, practically about the length of a brick. It is a depression of an inch and a half deep. The depression is three quarters of an inch. The stone block is an inch and a half above the pavement, but the gas box is three quarters of an inch. The depression is in length about eight and a half inches. The depression is caused by the sinking of one brick."

In order to illustrate how that was understood by counsel and the court, the Justice in his charge says:

"As was said by Mr. Perry, that the brick on one side was depressed below the gas pipe, and on the other side, or another side, was extended above, and that there were two depressions. You recollect the claim not only of the declaration, but the proof that this little girl struck her toe against one of these projections, and fell."

The proof in this case tends to show that on the west side of this gas box there was a depression of from three quarters of an inch to an inch and a half, and on the southeast side of the box one brick and perhaps half of another brick were thrown up about a quarter of an inch above the box at different points, which was caused, as one of the witnesses says, probably by the frost. But on the north side and the south side and the east side it was flush with the pavement. That being the case, if it was flush with the pavement, it is very clear that there was no sinking of the gas box, and that the defect, if any, was in the pavement, and this little girl either struck her foot against the top of the box where the depression took place on the west side, or against a projecting brick on the southeast side, and was thrown down. That seems to be the substance of the proof, as understood by both counsel and the court.

In his charge to the jury, the Justice said:

"I advise you that if you find that to be true, it is not necessary that she should step bodily into the hole; but if she struck her toe against one or either of those projections, that would be getting her foot within the hole, within the meaning of the declaration in this case, and on that point it would be sufficient."

That is to say, if she did not get into the depression at all, but struck her foot against a brick projecting above the pavement, and above the gas box itself, then the gas box thus depressed was a hole, and the averment of the declaration was satisfied by that evidence.

It seems to us that was error. It is very important that the exact difficulty here should be, if possible, ascertained.

Going a little further, we find an instruction which seems to be inconsistent with this. The court said:

"Mr. Perry alleges that the plaintiff stepped into the hole. You must find that she did step into that gas pipe; that there was a rise before it and behind it—you must find that she stepped in there or struck her toe against one of those protuberances, otherwise she cannot recover."

This seems to impose upon the jury the duty of finding whether, under the first count of the declaration, there was a depression or hole at the gas box, with an elevation before and behind it, and that she stepped into that hole.

The first and second instructions that I have read are inconsistent. The first one, we think, is error. The second one we do not think is justifiable by the proof. The rule is, that where instructions are inconsistent, we cannot tell which one the jury followed, and if there is error in either, there must be a new trial.

We think there should be a new trial. I would suggest that on a new trial, probably a new count should be added to the declaration to designate fully and carefully the circumstances surrounding the accident, because this is peculiarly a case in which the exact nature of the accident should be ascertained.

A new trial is therefore allowed.

WILLIAM W. SCOTT, TRUSTEE, ET AL.

vs.

ANTHONY HYDE, TRUSTEE, ET AL.

TAX DEEDS; INDENTITY OF PERSONS; PROOF OF TITLE.

1. In tracing titles, identity of names is *prima facie* identity of title, therefore, where in a suit in equity to remove a cloud from title, the complainants show a *prima facie* title resulting from identity of name, they must succeed, unless the defendants show that another person of the same name resided in the District at the time in question, who might have been the owner of the property.
2. In such a suit, the record of a tax deed of 1840 adverse to the complainants' title, does not even constitute a cloud thereupon, because the statute at that time did not make the tax deed even *prima facie* evidence of title.

Equity. No. 13,543. Decided January 22, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing in the General Term in the first instance of a suit to remove cloud from title. *Decree removing cloud and declaring deed void.*

The facts are stated in the opinion.

Messrs. FRANKLIN H. MACKEY and JOHN RIDOUT for the complainants.

Messrs. C. M. & H. S. MATTHEWS for the defendants.

The CHIEF JUSTICE delivered the opinion of the Court:

This is an appeal from the Equity Court. The defendants are sued as trustees and executors under the will of William W. Corcoran, deceased. The bill alleges that on or about the 14th day of March, 1891, Mary Lee Willis, James T. Richardson, John Willis, William W. Scott, Nellie C. Willis, Lucy C. Morris, Ambrose M. Willis, Andrew J. Willis, being well seised and possessed as tenants in common of original lot 28, in square 172, in the city of Washington and District of Columbia, and having been so seised and possessed for many

years prior to February, 1886, did, on or about said month of March, 1891, by a deed dated March 14, 1891, unite in conveying said described property to complainants in fee simple as tenants in common—that is to say, one undivided three-fourths part of said lot to complainant, William W. Scott, his heirs and assigns, in and upon the trust, among others, to sell the said land and divide the proceeds among the grantors of said deed, according to their respective interests as by reference to said deed duly recorded in Liber 1597, folio 106 *et seq.*, of the land records of said District will more fully appear, and the remaining one undivided fourth part of said land to complainant, Leo Simmons, his heirs, and assigns, in his own right, and complainants are now seised and possessed of said land under and by virtue of said deed; that a deed dated March 5, 1890, from the Commissioners of the District of Columbia, to Arthur T. Brice of said lot, as purchaser at a tax sale on October 6, 1887, for taxes and penalties for the year ending June 30, 1887, amounting to \$8.81, the purchase money being \$9.81, was executed, and thereafter Brice, by deed, executed to the defendants as trustees under the will of William W. Corcoran, deceased, and dated the 5th day of March, 1890, recorded in Liber 1476, at folio 26 of the land records of the District of Columbia, undertook to convey said lot to the defendants in fee simple.

Then follows a number of allegations in regard to the insufficiency and illegality of this deed by reason of the non-compliance of the officers of the District of Columbia in the proceedings to sell the lot for taxes, with the law, as before alleged.

The allegation of the bill is further that the deed to Brice is wholly void, but that inasmuch as the statute of 1877 provides that such a deed shall be *prima facie* evidence of title, its existence and the record thereof is a cloud upon the title of the complainants, which they pray may be removed.

The answer, in substance, denies that the complainants are the owners in fee of the premises. It denies that the

tax deed executed to Brice was illegal and void for the reasons set out in the bill, and also denies the facts upon which such reasons are predicated, except that they admit that the money with which said property was purchased at said tax sale was furnished by Corcoran, and not by Brice.

It appears in the evidence offered by complainant, that one Dr. John Willis, in 1802, received a deed for this lot from the original Government superintendent of Government buildings, who was authorized by law to make sale and conveyance of the lots belonging to the Government in the city of Washington, and that this deed was placed upon record. No actual possession of the lot was taken at any time until after the execution of the tax deed in 1890 by the tax collector to Brice. The complainants, after the receipt of the deed, which is recited in the bill, from the alleged heirs of Willis, caused to be erected a fence around this lot. That was about five months before the commencement of this action.

It appears further in the evidence that a sale of this lot was made for taxes in 1840; that the taxes had run from the year 1824 to 1835, and a deed was made after a tax sale to one Joshua Pierce; that in 1843 Joshua Pierce conveyed the lot to W. W. Corcoran, who, since that time, by himself and his trustees since his death, has paid the taxes upon this lot. It is claimed that the deed of 1840 from Pierce was defective and insufficient, owing to the failure on the part of the officers of the District of Columbia to comply with the terms of the statute existing at that time. It is further said that this deed cannot avail the defendants in this action for the reason that the statute at that time, and up until 1877, did not make the deed *prima facie* evidence of title; but on the contrary, the presumption was that it did not convey title unless it was shown that the requirements of the statute were complied with, the burden being upon the party holding the tax title to show that every step required by the statute had been complied with in the proceeding for the sale of the property for taxes.

It is further said by the complainants that no attempt has been made on the part of the defendants to show that all the steps required by the statute existing in 1840 had been complied with, or to show that the tax deed vested any title, in fact in Corcoran.

It is further said, in that same connection, that by an act of Congress of 1877, the deed of the tax collector is made *prima facie* evidence of title, and for that reason it became necessary for the complainants to file this bill in order that they might have an opportunity of showing that, in fact, the deed was illegal, taking that burden upon themselves for the purpose of removing the cloud upon the title. In other words, the tax deed upon the record prior to the act of 1887 was not a cloud upon the title, because, in fact, it was a defective deed, under defective proceedings, and the parties would never be able to prove that it conveyed any title, and because the presumption of law was not that it did convey title. But after the passage of the act of 1887, the reverse was true, and the deed was presumptive evidence of title, and necessarily the existence of the deed upon the record was a cloud upon the title.

It is objected upon the part of the defendants that the plaintiffs have not properly connected themselves by the evidence with Dr. John Willis, who is shown to have received this title in 1802.

The evidence is that Dr. Willis, according to an inscription upon his tombstone at Montpelier, in Orange County, Virginia, was born in Gloucester, Virginia, about 1770, and died in Orange County, Virginia, in 1811. His will is introduced in evidence by which it is shown that he owned quite a large property in Virginia, which was disposed of by that will, consisting of lands, houses, slaves and other property, and that he also possessed property in the city of Washington, which was also disposed of by his will. It is further in evidence that in 1850 his heirs filed a bill in partition here to divide quite a number of lots; but the lot in question, however, was not included in this partition proceeding.

I may say that if Dr. Willis died in 1811, it is patent that his actions, except as they have been left upon record, or are evidenced by some writing, could hardly be within the knowledge of any living witness. Eighty-one years have elapsed since his death, and all persons old enough to have known anything of him or his whereabouts, may be presumed to be dead, and whether he resided in Washington and owned property here, how he dealt with it, and what property he owned, would not be within the knowledge and memory of living witnesses, and necessarily to a considerable extent the identity of Dr. John Willis, who received the deed for the lot in question, with other property, in 1802, and the proof of his being the same Dr. John Willis, who was the ancestor of these complainants, must rest largely in reputation, and depend on what is ordinarily called hearsay evidence, but under the rules of law is admissible as being the best evidence, under the circumstances, which can be procured.

A number of papers were introduced in evidence which were found among the papers belonging to Dr. John Willis, who is the ancestor of the complainants. The first was a tax receipt for the payment of taxes on real and personal property in the city of Washington in 1803, signed by Washington Boyd, Treasurer of Washington City. The next was another receipt dated May 29, 1804, to Dr. John Willis for \$6.50, for taxes on slaves, five men and three women, due to the corporation of Washington, for the year 1803, signed by Washington Boyd, Treasurer of Washington City. There were also introduced in evidence several other tax bills to Dr. John Willis for various years, signed by Washington Boyd, City Treasurer. Another is a receipt dated 1804, for letter postage, due to Edward Eno, postmaster at Washington, and signed by him. There were also introduced in evidence bills from the Washington Dancing Assembly, bakers' bills, etc., all of which would tend to establish the fact that the Dr. John Willis by whom these bills were paid was a resident of Washington for some years, and that, too, after 1802.

Such seems to have been the reputation or tradition in the family, although none of the living members of the family, of course, are old enough to know the fact. They only received their information from their parents, who were the children of Dr. John Willis, who died in Orange County, Va.

There are two incidents that are present in this case with regard to the identity of Dr. John Willis, which are quite significant. Not only is the name John Willis identical with the name found to be the grantee in the deed executed in 1802, but the profession indicated by the prefix "Dr." is the same.

Again, it is not shown that any other Dr. John Willis than the ancestor of these complainants lived or resided at that time in Washington, or owned any property in Washington, which could have been done, probably had such been the fact.

As to the proper method of proving the identity of persons who have long since been dead, we refer to the case of *Stebbins vs. Duncan*, 108 U. S., 32. In that case, Mr. Justice Woods says:

"It is further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses it was necessary to prove the identity of the grantor in the deed, that is to say, that the John J. Dunbar by whom the deed purported to be executed was the same John J. Dunbar named in the patent for the lands in controversy. In any case slight proof of identity is sufficient. *Nelson vs. Whittall*, 1 B. and Ald., 19; *Warren vs. Anderson*, 8 Scott, 384; 1 Selwyn, N. P., 538, n. 7, 18 Ed." But the proof of identity in this case was ample. In tracing titles identity of names is *prima facie* evidence of identity of persons. *Brown vs. Metz*, 33 Ill., 339; *Catas vs. Loftus*, 3 A. K. Marshall, 202; *Gitt vs. Watson*, 18 Mo., 274; *Balbec vs. Donaldson*, 2 Grant (Pa.), 459; *Bogue vs. Bigelow*, 29 Vt., 179; *Chamblee vs. Tarbox*,

27 Tex., 139. See also Sewell vs. Evans, 4 Adol. and El., N. S., 626; Roden vs. Ryde, Id. 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthews County, Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia, where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed."

So that inasmuch as the defendants in the case at bar have offered no proof whatever going to show that there was any other Dr. John Willis living in the District of Columbia, or elsewhere, who might have been the owner of this property, the plaintiffs might well stand upon the *prima facie* proof of title resulting from the identity of the name. But there is more than that. It is reasonably shown that the ancestor of the complainants, Dr. John Willis, paid taxes on real estate here in the city of Washington for a number of years before his death, and that he must have resided here from his taking receipts in such matters as necessarily would be taken by a resident of the city, and not a non-resident.

It is further shown in the evidence that Dr. Willis, according to reputation, was a man of considerable wealth and standing. He was the brother-in-law of James Madison, President of the United States, and according to all the evidence and the surrounding circumstances, must have resided in the city for a considerable time prior to his death.

It is true that there was a partition suit by these heirs in 1850 with reference to other real estate belonging to Dr. John Willis, and that this lot was not included. We think the presumption is that by some mistake it was omitted. The fact that it was included in the original deed to Dr. Willis, and that there is no record of its ever having been disposed of by him or his heirs since that time, or by his legal representatives, raises the presumption that by some omission, it being an unenclosed lot, it was left out of the partition proceedings at that time. The reason for that omission is quite apparent, from the fact that it was not at

that time upon the record of the city of Washington in the name of Dr. Willis. It had been sold for taxes in 1840, and placed upon the records in the name of Mr. Corcoran, who after that time paid the taxes. That, perhaps, sufficiently shows the reason why an error was committed by the heirs, and why they did not include this lot in the partition proceedings.

We think, then, that the complainants, *prima facie*, have shown that they are in possession, not only claiming the legal title, but that they have the legal title to the property. It is very clear that the tax deed executed to Brice in 1890 is defective and that the proceedings were defective from beginning to end; that hardly one thing was done which was necessary to be done under the provisions of the statute, and the deed is therefore wholly illegal and void.

The defendants have never had possession of this lot. They never enclosed it. The character of their title has not been such as would draw the possession to it, or connect the possession with the defendants or the person whom they represent, so that it is not a case, on the part of defendants, that brings them within the purview of the decision in *Sharon vs. Tucker*, 144 United States, 533.

It is insisted upon the part of the defendants that the doctrine of laches should apply, and that the complainants are not in time in seeking their relief. The truth is that the complainants' title was never threatened until the placing upon the record of the deed of 1890. There was never any cloud upon their title. The placing of the tax deed of 1840 upon the record did not even amount to a cloud upon the title because the statute at that time did not make the deed *prima facie* evidence of title.

The complainants, within a year after the placing of the deed of 1890 upon the record, filed their bill to remove the cloud from their title, and we think are in time.

It is claimed by counsel for the defendants that the placing of the deed of 1840, to Pierce, on the record, and the subsequent deed from Pierce to Corcoran, created such a

title by deed in Corcoran, as would draw the possession to Corcoran. We think not, and we have already stated the reasons why it is not so. It was a void deed, and there was no actual possession taken, as was done in the case of Sharon vs. Tucker, *supra*.

For all these reasons, we think the plaintiffs are entitled to their decree to quiet title, and that the deeds upon the record of 1890 to Brice, and the subsequent deed from Brice to the trustees of Corcoran should be set aside and the title of the complainants be confirmed.

Of course the only thing necessary for us to pass upon, and the only thing that will be embraced in the decree is the tax deed of 1890. As to the deed executed in 1840 to Pierce, it is not necessary that anything be mentioned in the decree, because it is not embraced in the bill, and the complainants do not ask to have anything done in relation to it. It is only mentioned in this opinion, because it was referred to in argument by counsel for the defendants to show that the defendants have title to this property presumptively by reason thereof and the record of the same.

Of course the only thing which binds the Corcoran estate so far as the decree is concerned, in this case, is the matter in relation to the tax deed of 1890, which the complainants in their bill, say is a cloud upon their title, and which they ask to have removed, and which we think they are entitled to have removed, because they have shown that the tax deed is void and that they have a *prima facie* legal title.

HARRIET L. WOODS

vs.

TRINITY PARISH.

NEGLIGENCE; PUBLIC SIDEWALK; BILLS OF EXCEPTIONS; EVIDENCE;
INSTRUCTIONS TO JURY; INDEPENDENT CONTRACTOR.

1. In an action for damages for personal injuries alleged to have been caused by the negligence of the defendant, a question put to a witness as to whether the manner in which he had recommended work to be done, was the proper way to do it, is irrelevant and immaterial when no testimony was offered to indicate that the accident was caused by the failure to do such work.
2. Sec. 805, R. S. D. C. confers the *alternative* right, upon the overruling of a motion for a new trial and an appeal taken, to have a bill of exceptions, or case, settled in the usual manner. Both are not authorized.
3. If a person, while standing upon a paved and unenclosed place apparently a part of the public sidewalk, though really a part of the public parking, but where the public had a right to be, is injured by the fall of a shutter negligently secured to the defendant's building, the liability of the defendant for such negligence is as great as if plaintiff were standing upon the sidewalk itself.
4. In such a case, the evidence of a witness as to the point where the shutter struck upon the ground is competent as indicating a fresh break, although the witness did not see the shutter fall, but only saw the mark of a fresh break upon the pavement, and was told that was where the shutter fell.
5. A prayer for an instruction based upon a condition of affairs as to which there is no evidence, should be refused.
6. An instruction is bad which directs the jury that a particular circumstance is not of itself necessarily a defence, thereby indicating to them that they might disregard it in considering the case, whereas such circumstance tended as an element to establish a defence.
7. When the declaration in an action for damages for alleged negligence avers knowledge of defects, it is not essential for the plaintiff to establish by a preponderance of testimony that the defendant knew of defects, so long as the evidence indicates that defendant knew or might reasonably have known of them.
8. A mere abstract proposition of law offered as an instruction is properly refused.
9. Where there is no evidence tending to show that an accident occurred at the time of, or as incident to the work done by an independent contractor, the principle of the responsibility of an independent contractor does not apply.

At Law. No. 25,272. Decided January 30, 1893.

The CHIEF JUSTICE and Justices HAGNER, COX and BRADLEY sitting.

Hearing on an appeal by the defendant from order overruling motion for new trial in an action for damages for alleged negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. R. ROSS PERRY and WILLIAM A. MELOY for defendant (appellant).

Messrs. SHELLABARGER & WILSON and JOHN G. FAY for plaintiff (appellee).

Mr. Justice BRADLEY delivered the opinion of the Court :

This is an action brought by Harriet L. Woods, by her next friend, against the vestry of Trinity Parish, to recover damages for a permanent physical injury caused by the negligence of the defendant, in the falling of a shutter from the tower of the church building. She claimed fifty thousand dollars and recovered a verdict for twenty thousand dollars. The defendant moved to set aside the verdict upon two grounds; first, because the evidence was insufficient to sustain it; and second, because the damages awarded by the jury were excessive. This motion was overruled by the court below: The cause is here upon a bill of exceptions, and case stated.

It appears by the evidence that on May 26, 1883, while the plaintiff, a young girl of eleven or twelve years of age, was standing in the street upon the paved space near the tower at the southwest corner of the church building of the defendant, the building being situated at the corner of C and 3d streets, N. W., in the city of Washington, she was struck by a piece of a shutter and her body was paralyzed below the shoulders. She was permanently injured. It appears that the shutter which caused the injury was a wooden structure about eighteen feet in height and about three feet in width, composed of heavy timbers forming the framework, with wide and heavy slats interposed between the uprights, and that it was secured in an opening in the masonry of the

tower at about forty feet elevation from the ground. No witness was able to testify, and there was no evidence as to what was the occasion of the fall of the shutter. In falling to the ground, it was shattered, a piece of it struck the plaintiff, and caused the injury. An examination of the pieces indicated that nails of a large size had been used to secure the shutter in its position; these nails having been driven into the joints between the stones and brickwork composing the tower.

Sometime in the month of February, prior to the accident, the defendant caused an examination to be made of the church building with the view of ascertaining what repairs were necessary. This examination was made by Mr. Edward Baldwin, an expert builder, who made a report and submitted it to the vestry. In that report, he referred to certain repairs not necessary to mention in this connection, and with reference to the tower he suggested that: "The wooden frames of the towers be repaired where necessary and all the woodwork of the tower above the main roof, and the tinwork to have two coats of paint of the very best material of its kind."

He also submitted specifications of the cost of making the repairs, and included the cost of the erection of a scaffold around the tower for the purpose of making the needed repairs upon the stonework.

The evidence does not indicate by this report that any suggestion was made to the vestry of the defendant, or that Mr. Baldwin orally suggested that this shutter, or any one of the several shutters in this tower was insecure in its fastening. Mr. Baldwin was not employed to make the repairs, but there was evidence tending to show that such repairs as he advised were made. A stonemason, Burns by name, was employed to repair the stonework of the tower. He did not attempt to erect the scaffold suggested by Mr. Baldwin, but he provided a platform for his work by projecting timbers through openings made by removing the slats from the shutters, including the one that fell, and resting these

timbers upon blocks, which, in turn, rested upon the masonry. Burns was examined as a witness and testified that the timbers, that so projected through the shutter which fell, were so arranged that they did not rest upon the lower sill of the shutter and did not touch or interfere with its vertical frame; that there was nothing in his work that tended to or did render the shutter insecure in its fastening, and that he had no notice or knowledge, at the time that his work was completed and his scaffolding removed, that it was insecure. He also testified, that, in removing the scaffold, the work was so performed as not to interfere with the fastening or security of the shutter in its place.

There was some evidence indicating that the day of the accident was fair, mild, and bright, and also some evidence tending to show that just before the fall of the shutter there was a strong puff or gust of wind; but no witness was examined who pretended to have personal knowledge of the cause or occasion of the accident.

The exceptions cover the admission and rejection of evidence, the granting of certain instructions to the jury in behalf of the plaintiff, and the refusal of others prayed in behalf of the defendant.

The first exception taken was to permitting the plaintiff, against the objection of the defendant, to ask the witness Edward Baldwin the following question: "Is the manner in which you proposed to have this scaffolding built the proper manner, in your judgment, to build a scaffold for making such repairs as were called for in that tower?" The witness answered that it was. We are of opinion that the objection that the question called for irrelevant and immaterial matter should have been sustained. The question directed the attention of the jury to the indirect suggestion, that the failure to construct such a platform was an act of negligence on the part of the defendant, which they might consider, whereas there had not been, nor was there subsequently offered any evidence indicating that the accident was contributed to, or caused by the failure to erect such a scaffold.

The second, third, fourth, fifth and sixth exceptions cover the rejection by the court of several items of evidence offered by the defendant. They were not pressed at the hearing, and are not apparently of sufficient consequence to justify consideration.

The seventh exception partly relates to the rejection of evidence tending to show where the inner line of the sidewalk in front of the church, and the outer line of what might have been parking, but was not, coincided, with the view of indicating that, when she was injured, the plaintiff was not standing upon the sidewalk proper, but upon the paved space between the sidewalk and the front building line of the edifice. The evidence indicated that the whole space in front of the church was paved and unenclosed. It was part of the public street, upon which any one of the public had a right to be, and it was therefore immaterial upon which part of it the plaintiff was standing at the time of the accident. We are of opinion that there was no error in excluding the evidence.

The remaining item under that exception is the overruling of the objection of defendant to a question put to the witness Edward Baldwin in rebuttal. He was asked whether he had stated to the vestry that no repairs were to be made to the frames, and that nothing was to be done to them but to put in the slats. It appears that there was evidence tending to prove that Baldwin had stated to some members of the vestry that repairs to the frames were needed. The question as asked is perhaps a little fuller than what was proved in behalf of the defendant; but the variation is not sufficient to justify the court in holding that it was error in the trial court to permit the question. It is objected by the plaintiff that, by the bill of exceptions, it does not appear that the question was answered, and that therefore no error is shown. The whole evidence is made a part of the record, however. The bill of exceptions refers to the record and the exhibits contained in it, in several places, and this exception states that "because said exceptions are not

apparent upon the record of said cause," they are made a part of the record therein. The case and exceptions must be treated together, as the complement of each other, and by the case it appears that the question was answered in the negative. In this connection, we direct attention to the organic act establishing this court (Sec. 805, R. S. of D. C.), which confers the *alternative* right, upon overruling a motion for a new trial and an appeal taken, to have bill of exceptions, *or* case settled in the usual manner. Both are not authorized. See *O'Neal vs. The Dist. of Col., McA. & Mackey*, 68; *in re Will of John Hoover*, 18 D. C., 541.

The eighth exception covers the refusal of the court to strike out as hearsay the evidence given by Anne J. Chapman, as to the point where the shutter struck upon the ground, because it appeared that she did not see the shutter fall, that she only saw the mark of a fresh break on the pavement, and was told that it was where the shutter struck. The motion was properly overruled, inasmuch as the evidence was competent to the extent that it indicated a fresh break, and where the break was located. We are of opinion that it was unimportant whether the shutter fell upon the paved space that might have been, but was not parked, or whether it fell upon the sidewalk proper. The only material matter was that it fell in the street where the public had a right and were liable to pass, or to be found. It is apparent that a portion of her evidence was entirely competent, and it would have been improper to have granted the motion.

The only exception taken to the charge of the court was to several "suppositious" cases, given by way of illustration by the trial judge. In the disposition that will be made of this case it will be unnecessary to criticise those items, and they are passed without comment.

All of the instructions granted to the plaintiff are mentioned by the court in his charge; the twelfth reads as follows:

"If the jury believe from the evidence in this case that the defendant employed Mr. Baldwin to examine the con-

dition of said church, and to make a report to the defendant of what repairs were needed, and if the jury further believe that he did make a report that the frames of these shutters should be repaired, such report would be notice to the defendant that those frames were not in proper condition, and, thereupon, they were bound to employ reasonable means and efforts to inform themselves as to what their actual condition was (that is, what the specific defects were, if any), and failure in this regard would be negligence on their part; and the fact that they employed Mr. Burns to repair the stonework and Mr. Brown to paint the shutters would not of necessity relieve them from the duty to inform themselves as to the actual condition of those shutters and to place them in such condition as would make them safe. Nor would the fact, if it be the fact, that Burns, in doing his work, left the shutter improperly repaired, and thus less secure than it was before, relieve this defendant from that duty. If, in fact, the shutter was insecure, and if, in making such examination, as the report of Baldwin made it their duty to make, they could by the employment of reasonable means and diligence have discovered this insecurity, and if they failed to make such examination and to make any repairs to the frames in respect of their condition or their state of security, this is negligence which would render the defendant liable to the plaintiff in this case."

First, this instruction improperly suggests to the jury that upon the evidence they might find that Mr. Baldwin reported to the defendant that the frames of the shutters should be repaired. The evidence given by Mr. Baldwin makes no pretence that he so reported, and the evidence for the defendant expressly negatives such inference, and indicates that Mr. Baldwin's statements relative to repairs upon the shutters referred solely to the slats. Second, the jury were informed that if they found that such report was made, as matter of law, the defendants were bound to use reasonable means to inform themselves what the specific defects were. The inference of fact indicated was not jus-

tified by the evidence, as just stated, and the inference of law could not be drawn from an uncertain premise. Third, the jury were instructed that the report of Baldwin made it the defendant's duty to make an examination of the shutter, and that further if in such necessary examination, by reasonable means and diligence they could have discovered the insecurity, and failed to examine or to make the repairs, they were guilty of negligence. The court may not have intended to direct the jury that Baldwin's report imposed upon the defendants this duty of examination, but we understand that to be the legitimate import of the instruction. The instruction is otherwise confusing and misleading. It fails to leave to the jury solely the question whether the defendant used reasonable care and diligence to keep the building and shutters in such condition as to prevent their being a source of danger to the public. This was a matter exclusively for them.

The plaintiff's sixth instruction is as follows:

"If the jury find that, in the winter prior to the accident, the defendant employed a person to examine the shutters and report their condition, and he failed to notice or report the insecurity of this shutter, such report is not necessarily a defence to this action, provided the shutter was, in fact, insecure."

This instruction is bad as being addressed to a segregated circumstance in the evidence, as tending to mislead the jury by directing them that this circumstance was not necessarily a defence, and thereby indicating to them that they might disregard it in considering the case; whereas, it tended, as an element, to establish reasonable care and diligence on the part of the defendant. The instruction indirectly intimates that care and diligence on the part of the defendant is no defence if, in fact, the shutter was insecure, thereby making the defendant liable as an insurer.

The plaintiff's ninth instruction is as follows:

"If the jury believe from the evidence in this case that the defendant undertook to repair the tower in which this

shutter was, and employed mechanics to make such repairs, and if the jury further believe, that in the construction of the scaffold, for the purpose of making such repairs, or in the removal of said scaffold, or both, this shutter was loosened, and so rendered insecure and unsafe, it was the duty of the defendant, after said contractor had removed his scaffold, to see to it that the contractor had left this shutter in an apparently safe condition. The defendant could not rely upon the care and skill of the contractor in this regard, but had a positive duty to perform in relation thereto, and if the contractor did leave it in a manifestly unsafe condition, and if the defendant's agents could easily have seen such defects and insecurities, but did not, by reason of which it fell, the defendant is liable."

This instruction is bad in several particulars. First, there was no evidence to justify the jury in the conclusion to which they were invited, that the shutter was loosened by the construction or removal of the scaffold. No one so testified, and Mr. Burns, the contractor who put it up and removed it, stated positively that the scaffold did not rest upon or affect the shutter, and that its security was not impaired in any way by him. Second, the jury were improperly directed if they drew this unpermissible conclusion of fact, that as matter of law, it was the positive duty of the defendant to see to it that Burns had left the shutter in an apparently safe condition. *U. S. vs. Ross*, 92 U. S., 281; *Manning vs. Insurance Co.*, 100 U. S., 693.

At the instance of the defendant, the trial court granted and gave to the jury several instructions which laid down the measure of responsibility for a negligent act as favorably as the defendant could expect; but the qualification of those instructions by the inconsistent provisions expressed in the instructions granted to the plaintiff, which have been just criticised, was so marked as to necessarily confuse the jury and operate injuriously to the defendant. Several instructions asked by the defendant and refused by the court, to which exceptions were taken, are relied upon as error, and demand some reference and comment.

The defendant's second instruction was as follows:

"The jury are further instructed that inasmuch as the declaration charges that the defendant knew that said shutter was in a loose, unsafe and dangerous condition, it is therefore incumbent on the plaintiff to establish or prove the fact of that knowledge by a preponderance of testimony."

This instruction sought to impose upon the plaintiff the obligation of establishing by a preponderance of testimony that the defendant knew of the unsafe condition of the shutter. This degree of knowledge was not essential in order to enable the plaintiff to make out her case. It was sufficient, that, evidence of the want of security of the shutter in its fastening being given, the plaintiff should indicate by evidence, notice to the defendant of such defect, or circumstances from which such notice could properly have been presumed. The instruction was rightly refused.

The fourth instruction asked by the defendant was as follows:

"Should the jury find, from the evidence, that the accident resulted from a defect in the shutter existing at the time of the accident, but of which defect the defendant had no actual notice, then notice can only be presumed from the existence of said defect for so great a time that a reasonably prudent man would have observed the said defect, and such previous existence of said defect for said period of time must be affirmatively proved and cannot be presumed."

This instruction was practically covered by the defendant's third prayer which was given by the court, and we find no error in its rejection.

Another instruction, marked number 4, was as follows:

"If the jury shall find, from the evidence, that there was a defect in the said shutter which would not have impaired its safety under ordinary circumstances, even if they further find that the defendant had actual notice of said defect, yet if they shall further find that an unusual gust of wind cooperated with the said defect to cause the said accident, and that the said accident would not have occurred without said gust of wind, then they shall find for the defendant."

The refusal of this instruction was justified by the fact that it is predicated of circumstances of which we find no evidence in the record, namely, that there was a defect in the shutter which would not have impaired its safety under ordinary circumstances.

The fifth instruction asked by the defendant was as follows:

"The jury are instructed, as matter of law, that the defendant in this case was bound to no greater degree of care in the management of its real estate than is, by law, required from the owner of personal property; and that it is in no otherwise responsible for negligent acts committed with respect to said real estate by others than would be the owner of personal property for a similar use of his property."

This appears to be the statement of an abstract proposition of law, and as such, was properly refused, and it also suggests the liability of an independent contractor, which, in our view of the evidence in this case, had no place which would justify its consideration.

The twelfth instruction is very lengthy and is as follows:

"If the jury shall find from the evidence that the defendant was the owner of the premises in question; and that in the month of February, 1883, it caused a careful examination of the condition of its premises to be made by the witness Edward Baldwin; and if they shall further find from the evidence that the said Baldwin was an architect and builder of good repute and skilled in his calling; and if they shall further find from the evidence that the said Baldwin actually made examination and reported his judgment thereupon to the defendant, and that the defendant, acting upon said report, employed the witness Burns to do such repairs upon the stonework of the south tower of the said premises as were recommended by the said Baldwin, and further employed one Macauley and the witness Brown to do such other repairs upon the said south tower as were recommended by the said report; such repairs being all recommended by said Baldwin in respect thereto; and if the jury

shall further find from the evidence that the said Burns and Macauley and Brown were men of good repute in their respective trades, and that those trades were such as were specially concerned in the doing of the work upon the said south tower recommended by the said Baldwin; and if the jury shall further find from the evidence that the defendant retained no control whatever over the said Burns or Macauley or Brown, or either of them, in the doing of their respective works in pursuance of the recommendations of said Baldwin; and if they shall further find from the evidence that the said Burns and the said Macauley and the said Brown did execute the work entrusted to them, respectively, by the said defendant in pursuance of the recommendations of the said Baldwin; and if the jury shall further find from the evidence that the accident in question resulted from the negligent manner in which the said contractors, or any of them, did the work entrusted to them, then the jury are instructed that the defendant has done its full duty in the premises and is not to be held responsible for the acts of omission of the said contractors, or any of them, unless they shall further find that after the said contractors, or any of them, had finished their work, the condition of the said south tower or any part thereof was such as to charge a reasonable man with notice that the said contractors, or any of them, had done their or his work defectively, or that the south tower, after such work was done, was in so palpably a dangerous condition as to suggest to a reasonably prudent man the necessity of making further repairs thereon, in order to insure its safe condition."

One sufficient criticism of this instruction is that so far as the paragraph is concerned which premises "if the jury shall further find from the evidence that the accident in question resulted from the negligent manner in which the contractors did the work," that there was no evidence which would justify the jury in coming to that conclusion. Another criticism is that there was no evidence tending to indicate that the accident occurred at the time of, or as in-

cident to the work done by Burns in constructing or removing the platform, and therefore that the principle of the responsibility of an independent contractor could not apply.

The fifteenth instruction had been substantially given in other instructions granted by the court, and might safely have been given; but we are of opinion that the refusal of the court to give it was not error.

The seventeenth instruction was as follows:

"If the jury, from all the evidence, find that the moving cause of the accident is not manifest, but must be sought by inferences from the testimony, and the testimony will justify the finding of a cause which would relieve the defendants from liability, just as reasonably and naturally as the testimony will justify the finding of any cause on account of which the defendant would be liable, then the plaintiffs have failed to establish their cause of action and defendants are entitled to a verdict."

This instruction would have tended to confuse the jury in their consideration of the evidence. It tended to improperly interfere with the exercise of their judgment and reason in considering the evidence and was properly refused.

The nineteenth instruction was as follows:

"If the jury find, from all the evidence in the cause, that at the time the plaintiff received the injury in question she was upon the platform in front of the church—a temporary structure pertaining particularly to the church for convenience of access thereto—elevated as a step some inches above the sidewalk, and forming no part of such walk, and that she was thereon at the time, not for any purpose of passage or travel, but for play; and if from such evidence the jury further find that the defendant had no actual knowledge that the shutter frame in question had become insecure; and that such condition of insecurity was caused by some carelessness of the workmen employed by Burns, an independent contractor, in using or removing their scaffold timber, so recently that defendant was not chargeable with negligence in

not having discovered such insecurity, then the jury must return their verdict in favor of the defendant."

This was properly refused, inasmuch as it relieved the defendant from responsibility, provided the plaintiff, at the time of the accident, was not standing upon the sidewalk as distinguished from the space in front of the church edifice, but was standing upon that paved space. As we have already intimated, we do not perceive any difference in the degree of responsibility on the part of the defendant for an act of negligence of the character for which recovery is sought, to one who stood upon the paved space, rather than upon the sidewalk proper. The paved space was open and unenclosed. The public were at liberty to be, and were invited by the want of enclosure, and by the fact of paving, to pass and repass, and to stand upon it for all proper purposes.

This disposes of all of the rejected instructions asked in behalf of the defendant.

The only remaining question relates to the matter of excessive damages. The accident to the plaintiff was a most melancholy one. Its effect upon her and upon her whole future life was terrible and irretrievable. No money judgment could compensate for such an injury. If entitled to a verdict at all, upon the evidence, however, the amount of the verdict should have been reasonable, not only with reference to the character of the injury to the plaintiff, but with reference to the circumstances of the defendant. It was never intended by the law that juries, excited by feelings of sympathy for an injured plaintiff, should be permitted by wild and excessive verdicts to retaliate upon a defendant for an act of mere negligence, by subjecting him or it to a loss that would amount to practical forfeiture. We are of opinion that the amount of this verdict was unreasonable, considering the circumstances of the plaintiff, the probabilities of her being compelled to earn her own living, and the annual income she could reasonably be expected to realize by her own exertions, and with reference to the circum-

stances of the defendant; and if there were nothing in the trial which would justify the setting aside of the verdict for error in law, the excessive amount of damages awarded by the verdict would require that it should be set aside.

The verdict is set aside and the case is remanded to the special term for a new trial.

IN THE MATTER OF THE ESTATE OF ALLAN McLANE,
DECEASED.

WILLS; FRAUD AND UNDUE INFLUENCE; POWER OF COURT TO
DIRECT VERDICT.

1. In order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence.
2. When in the trial of issues sent to a special term from the Orphans' Court upon a caveat to a will, a motion is made after the caveators have offered their evidence and rested, to direct the jury to return a verdict in favor of the validity of a will, it becomes the duty of the court if, in its judgment, considering all the evidence that has been offered, no reasonable mind could properly come to the conclusion that the fact of undue influence or fraud has been proved, to sustain the motion and direct a verdict accordingly.
3. There is no difference between the power of the court to direct a verdict in will cases where the issue is as to fraud or undue influence, and its similar power in other cases.
4. If a testator by his will gives to one who would inherit from him were he to die intestate, a portion less than would be inherited by the same person in case of intestacy, because of resentment against that person, growing out of an actual controversy between the testator and the legatee, the will would in nowise be invalidated by that circumstance.
5. When a testator some time prior to making his will, declared to his daughter his purpose to make a different disposition of his property from that actually made, and one more favorable to her, while that circumstance may be considered in connection with other evidence, it is never sufficient, unsupported, to cause a will to be set aside.

At Law. No. 32,651. Decided January 30, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing upon a bill of exceptions taken by the caveators in the trial of issues upon a caveat to a will. *Affirmed.*

The facts are sufficiently stated in the opinion.

MESSRS. JOHN S. WISE, JERE. WILSON and BLAIR LEE for caveators (appellants).

MESSRS. BERNARD CARTER, ENOCH TOTTEN, and GORDON & GORDON for caveatees (appellees).

The CHIEF JUSTICE delivered the opinion of the Court :

This is an appeal for the purpose of reviewing the rulings of the Justice who sat in the special term at the trial of the issues sent to it from the Orphans' Court, upon a caveat filed in that court by the appellants, to the admission to probate of the last will and testament and a codicil thereto, of the late Allan McLane, who died in the city of Washington in December, 1891, and who was at the time of his death a resident of the District of Columbia. The will bears date, and was executed, March 27, 1888, and the codicil the 27th day of August, 1888—both papers having therefore been executed more than three years before the death of the testator. The issues so sent for trial in the special term were as follows:

1. Was the paper writing bearing date the 27th day of March, 1888, offered as the last will and testament of Allan McLane, and the paper writing bearing date the 27th day of August, 1888, offered as a codicil to said last will and testament, and if either of them, which, procured by the fraud, misrepresentation or artifice of Abby K. McLane or of James L. McLane or of either of them, or of any other person or persons?

2. Were the paper writings offered as the last will and testament of the said Allan McLane and as the codicil thereto, or was either of them, and if either of them, which, executed under the undue influence, importunities, suggestions or persuasions of the said Abby McLane and James

L. McLane, or of either of them, or of any other person or persons?

During the trial certain exceptions were taken by the caveators to the rejection by the court of evidence offered by them; and at the conclusion of the evidence offered by the caveators the caveatees moved the court to direct the jury to render a verdict in favor of the validity of the will.

Thereupon the court instructed the jury that the caveators had given no evidence that fairly tended to invalidate the will, and directed the jury to return a verdict for the caveatees, which the jury did accordingly. To the giving of this instruction to the jury by the court and to the rendition of the verdict by the jury in accordance therewith the caveators excepted.

As the matter of the latter exceptions seems to be most relied on by the caveators as furnishing ground upon which this court should order a new trial, it will be first considered.

The caveators and contestants of the will are Anne Cropper, a daughter and only surviving child of the testator, and John Cropper, her husband, and the caveatees and proponents of the will are Abby K. McLane, widow of the testator, and James L. McLane, a brother of the testator, who are respectively nominated as executrix and executor thereof. The charge is that the will was procured by fraud and undue influence.

Judge Redfield, in his treatise on the Law of Wills (p. 510), says: "Fraud and undue influence are so nearly synonymous that it will not be important to enter into the definition of possible distinctions between them, since the result of either must be the same upon the testamentary act. In regard to express fraud, the cases are variant. As where the testator, near the time of his decease, being pressed to execute a second will, inquired whether it was the same as the former, and was told that it was, and executed it under that impression, it was held that this testimony was admissible to show the will thus executed fraudulent, and thus to set up the former will."

And in note 1 on the same page: "Many of the cases have labored the distinction between fraud and undue influence. The latter is undoubtedly the more extended term, and includes a great number of cases, and an almost indefinite extent and variety of means to accomplish its purposes, which are not included in the former. So that, while undue influence embraces fraud, fraud by no means embraces every species of undue influence."

In *Tyson vs. Tyson*, 37 Md., 582, the court expresses the rule in this language: "In regard to undue influence, it is equally well settled that in order to invalidate a will on this ground, it must be such as to deprive the testator of his free agency and subordinate his will to that of another, thus making the testamentary act not the will of the testator, but that of the person exercising the dominion or control over him."

In *Conley vs. Nailor*, 118 U. S., 135, the court says: "The undue influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands *in vinculis*; it must amount to force or coercion, destroying free agency. That is undue influence which amounts to constraint, which substituted the will of another for that of the testator. It may be either through threats or fraud; but however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made;" citing a number of authorities.

In *Mackall vs. Mackall*, 135 U. S., 172, the court says: "Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Matter of Gleespin's Will*, 26 N. J. Eq., 523. * * * Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. *Lee vs. Lee*, 71 N. C., 139. Nor does the fact that the testator on his

deathbed was surrounded by beneficiaries in his will. *Bundy vs. McKnight*, 48 Indiana, 502. * * * Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him. *Elliott's Will*, 2 J. J. Marsh, 340; S. C. Redf. Am. Cas. on Wills, 434. * * * It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

Undue influence must destroy free agency. It is well settled, that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence."

The rule laid down by Greenleaf is: "It must be an influence obtained either by flattery, excessive importunity or threats, or in some other mode by which dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his will, what he is unable to refuse." 2 Greenl. on Ev., Sec. 688 (14th Ed.).

"1. To destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his. 2. That it must be an influence especially directed towards the object of procuring a will in favor of particular parties. 3. If any degree of free agency or capacity remained with the testator, so that when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty, and it must have proved successful to some extent, certainly." 1 Redfield on Wills, 4th Ed., 524, 525.

In *Children's Aid Society vs. Loveridge*, 70 N. Y., 387-394, the court says: "In order to avoid a will upon any such ground, it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed full agency, or which, by importunity which could not be resisted, constrained the testator to do what was against his free will and desire, but which he was unable to refuse or too weak to resist."

These authorities are sufficient to show the established definition of fraud and undue influence, and in this jurisdiction especially the decisions quoted, rendered by the Supreme Court of the United States, are the paramount law. We have carefully noted the authorities on this subject referred to by counsel for the caveators, and find they substantially concur with the cases we have cited. Counsel for caveators have referred to authorities as to the admissibility of particular evidence and the effect the same should have in proving fraud or undue influence, which it is not now necessary to consider.

It may be well in this connection to refer to some authorities upon the rule which should guide the court in withdrawing a case from the consideration of the jury.

In *Pleasants vs. Fant*, 22 Wallace, 121, the Supreme Court of the United States thus states the rule, Justice Miller delivering the opinion:

"It is the duty of a court in its relations to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

"In the discharge of this duty it is the province of the

court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor—that is the business of the jury—but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that conceding all the inferences which the jury justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.”

In *Randall vs. B. & O. R. R.*, 109 U. S., 479-482, Mr. Justice Gray said: “It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.”

See also *Montclair vs. Dana*, 107 U. S., 162; *Baylis vs. Ins. Co.*, 113 U. S., 319; *Goodlett vs. Railroad Co.*, 122 U. S., 391.

This rule as to the powers and duty of the court has in more recent decisions of the Supreme Court of the United States been recognized as well in reversing as affirming the action of the inferior court in withdrawing the case from the consideration of the jury.

See *Texas Pacific R. R. Co. vs. Cox*, 145 U. S., 593, and the cases there cited.

But it was intimated by counsel for caveators that while courts might properly exercise this control over verdicts, in ordinary actions, especially where the issue is as to negligence, it ought not to be allowed in will contests where the issue is as to fraud or undue influence. No satisfactory reason was given and we cannot perceive any for such a discrimination, and the authorities are abundant to the contrary.

The Supreme Court of Pennsylvania in *Herster vs. Herster*, where the issue was as to fraud and undue influence in procuring a will, held:

"There is, in our opinion, no evidence from which the jury would be justified in inferring fraud, duress, or undue influence in the making of this will. In an issue of *devistavit vel non*, the question of mental unsoundness or undue influence ought not to be submitted to the jury where the evidence is of such unsatisfactory character that the court would not sustain a verdict upon it. A court of law has a higher duty to perform than merely to answer points of law. It is its duty to see that the law is forthwith administered, and such administration requires that a man's will, the most solemn instrument he can execute, shall not be set aside without sufficient evidence to impeach it. There is no redress here for an erroneous or improper verdict, but when a case is submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse."

And in *Tyson vs. Tyson*, 37 Md., 581, the Court of Appeals of that State held: "We do not propose to review the many cases in which the question as to the legal sufficiency of evidence has been considered by the court. It is sufficient to say they all hold the rule to be, that whenever the evidence offered is of such a character that no rational mind could infer the fact ought to be established by it, it is the duty of the court, upon application, to instruct the jury that there is no evidence before them legally sufficient to warrant their finding the fact so attempted to be proved."

This, too, was in case of issues in reference to a will alleged to have been procured by fraud and undue influence. Cases upon this point might be multiplied, but enough have been cited to illustrate the rule. The question for our solution is, ought the jury, upon the testimony offered by the caveators, in view of all the circumstances developed by it, fairly considered by them, had the cause been left to their determination, to have rendered a verdict for the caveatees? In contrast it may be said that the supposition that the jury if left free from the direction of the court *might possibly* have returned a different verdict cannot aid us, since the inquiry is not what might the jury have done, but what ought they in the proper, legal exercise of their function as jurors, in good conscience, to have done. If from the evidence submitted by the caveators, the jury would not be justified in inferring fraud or undue influence in the making of this will, it was the plain duty of the justice presiding to direct the jury to return a verdict for the caveatees in accordance with the rule adopted by the Supreme Court of the United States in repeated instances, which if not in accord with the weight of authority elsewhere, as we think it is, would yet be the absolute rule for our guidance.

Having determined some of the principles of law, as we think applicable to a proper investigation of this case, we turn to the testimony produced by the caveators on the trial of these issues. The evidence is voluminous, covering about 350 printed pages. Any fair condensation of it would exceed the proper limits of this opinion. We have carefully read and considered the entire testimony, but will only refer to such portions of it as may be necessary in announcing our conclusions.

There were but four witnesses examined. They were the caveators, Anne Cropper, Bridget Maguire, Smith Thompson, and W. K. Chapman.

Mr. Thompson is a clerk in the office of the Register of Wills, and was called for the purpose only of proving certain papers on file in that office and the rate of commissions allowed executors in the District of Columbia.

Bridget Maguire was for some years a nurse living in the family of Mr. Allan McLane, the testator, and her testimony takes up about three of the 495 pages of the record.

W. K. Chapman was Mr. McLane's coachman, who testified that in 1886 or 1887, he drove Mr. Allan McLane, General Joseph B. Johnston and Mr. Baldwin, to the office of Gordon & Gordon, and while they were there Mr. Jas. L. McLane came.

Mrs. Cropper, the caveator, and daughter of the testator, is therefore the only other witness who testified in the case. The other evidence in the case consists of:

(a) The will and codicil.

(b) The inventory of the personal estate, which, according to the Orphans' Court appraisement, is valued at \$373,-372.00.

(c) The letters of the testator, Allan McLane, written to his daughter, Anne Cropper, and to her husband, John Cropper, and their letters to him, and several letters written by him to other persons.

(d) Several letters written by Miss Nellie Hunt to Miss Cropper, a sister of John Cropper.

Allan McLane, at the time of his death in December, 1891, was in the sixty-eighth year of his age. He executed his will in March, 1888, and a codicil in the following August.

His letters and the testimony of his daughter show that he was a truthful, courageous, high-toned gentleman, well educated, intelligent, possessing a strong will and great force of character.

In the early part of the decade of 1850-1860, he married his first wife, Miss Marion Bache, of Washington, who lived but a short time, and died without children.

Thereafter, in the year 1856, he married in Portsmouth, New Hampshire, Miss Knight, whose father was then dead, being at the time of his death a resident in the State of California, and had died leaving but little property, and a widow and three daughters. By this marriage with Miss

Knight, Mr. McLane had four children, all of whom died in their infancy, except his daughter Anne, the caveator, who was born March 11, 1859.

In the early part of the decade, 1860-1870, Mr. McLane took his wife's youngest sister, Miss Abby Knight, then a girl of about 12 years of age, to live with him and his wife, her mother also living in the household a part of each year. This condition of things continued till the year 1871, when Mr. McLane went to Europe for his wife's health, taking with him his daughter and Miss Abby Knight; the latter returning to America in the following year. Mr. McLane remained in Europe until the fall of 1877 (his wife dying there in 1874), when he returned to America. He again in 1878 went to Europe with his daughter and Miss Abby Knight, returning in 1879 to Washington. In 1880 he moved into his house at 1500 Vermont Avenue, which he had built for himself, where he resided with his daughter, Miss Abby Knight, and her mother, as members of his household until the marriage of his daughter, in 1881, to Mr. John Cropper. Upon their marriage Mr. and Mrs. Cropper resided in New York, where the former had previously resided, and from that time Miss Knight and her mother remained as members of Mr. McLane's household until his marriage with Miss Abby Knight in October, 1887, and from thence until his death in December, 1891, the members of his household were himself, his wife, and her mother. It would appear that Miss Abby Knight had been mainly reared, educated and supported after Mr. McLane's marriage to her sister in 1856—at least from 1860—by Mr. McLane, her mother being a widow of limited income. In March, 1888, Allan McLane executed his will. At that time his daughter had no children, nor had she any at the time of the trial of this case. Her husband was a lawyer, and as Mrs. Cropper testifies, possessed of a considerable estate, the income from which furnished them a handsome support.

After Mr. McLane's last marriage, he and his family, for

the greater part of each summer, resided at Narragansett Pier, where, in 1885, he built a cottage which he called "Gillian Lodge," which they occupied as a summer residence until his death.

On the 27th of March, 1888, Mr. McLane executed the will now in question, by which he appointed his wife executrix, and his brother, James L. McLane, executor of the same. He gave to his wife \$5,000 for her services as executrix, also \$5,000 to be paid to her immediately after his death, and the lot and dwelling house on Vermont Avenue, with the furniture, etc., therein, excepting certain articles which were given to his daughter Anne. The value of the Vermont-Avenue property and furniture is said to have been about \$60,000.

He gave to his daughter Anne, absolutely his interest in a San Francisco water lot property, said to be of the value of \$1,800; Gillian Lodge and furniture, said to be of the value of \$30,000; and also all interest in a life insurance policy for \$10,000.

The fifth paragraph of the will is as follows:

"Fifth. After the payment of my debts, expenses of probate of this my last will and testament, and of the legacies herein mentioned, I direct that the balance of my estate, real, personal and mixed, of which I shall die possessed, or to which I shall be entitled at the time of my death, and wheresoever situate, be divided into two equal parts or shares, and I give, devise and bequeath one part or share of the said two equal parts or shares, unto my wife, Abby, her heirs, executors or administrators, the same to be received by her in lieu of dower. The other or remaining part or share of said two equal parts or shares of the balance of my said estate, in the event of my leaving me surviving a child or children of my wife Abby, or in the event of there being born to me of my wife Abby a posthumous child or children, I give, devise and bequeath in fee unto my daughter Anne and to such child or children by my wife Abby, share and share alike. In the event, however, of my not leaving me surviv-

ing a child or children of my wife Abby, or in the event of there not being born to me, of my said wife, a posthumous child or children, then I give, devise and bequeath the said other and remaining part or share of said two equal parts or shares of the balance of my said estate, unto my brother, James L. McLane, his heirs, executors, and administrators, in trust to take the rents, issues and profits thereof, and apply the same to the use of my said daughter Anne (paying the same over to her) for life, and upon her death, to pay over the principal thereof, with all accumulation, to her children and grandchildren, said grandchildren to take *per stirpes* and not *per capita*. And in case my said daughter Anne shall die without issue her surviving, then I direct my said trustee to divide the said remaining part of the two equal parts or shares of the balance of my said estate, into ten equal parts or shares, which I give, devise and bequeath as follows:

(a) To my sister, Mrs. Rebecca Hamilton, the income for life from one part or share, and at her death the principal is to fall back into this remaining part or share of my estate for division as hereinafter provided for.

(b) To my niece, Charlotte B. McLane, daughter of my deceased brother, Charles B. McLane, one part or share.

(c) To my sister, Mrs. Mary Robbins, two parts or shares.

(d) To my brother, James L. McLane, three parts or shares.

(e) To my nephew, Allan McLane (son of my brother, James L. McLane), one part or share.

(f) To my wife, Abby, two parts or shares.

Provided, however, that should any of the above-named party or parties, in this division of the said remaining part of the two equal shares of the balance of my estate die during the lifetime of my daughter Anne—then I direct that the share or shares given to him, her or them, as also the share given for life to my sister, Rebecca Hamilton, shall be divided amongst those who may then survive, in the proportions above mentioned."

Learning that his daughter had expressed a desire to live in Washington, in May, 1888, he proposed to give her \$15,000 with which to build a house in Washington, which offer was accepted, and the house was built and occupied by Mr. and Mrs. Cropper in September, 1889, and thereafter, as their home until the decease of Mr. McLane. The sum of \$1,500 was added to the original sum of \$15,000 to meet an excess in the cost of the house over the original estimate.

On the 27th day of August, 1888, Mr. McLane executed a codicil to his will, of which the following is the material part:

"Whereas, in paragraph "third" of my aforesaid last will and testament, I made a gift and devise, with certain provisions there appearing, unto my daughter Anne and her heirs, of my cottage property at Narragansett Pier, R. I., known as "Gillian Lodge," inclusive of the dwelling house and land, and the stable and land, and with all the appurtenances to both belonging, and inclusive of all the household furniture in the dwelling house belonging to me, with all other articles therein belonging to me; therefore, I now make this codicil (No. 1) in order to, and I do hereby, revoke the said gift and devise unto my said daughter Anne and her heirs, made in said paragraph "third" of my aforesaid last will and testament; and further, I do hereby now give and devise all the same and said property referred to, at my death, unto my wife Abby and her heirs; the said gift and devise has reference alone to the land (two acres) now embraced in my original purchase for "Gillian Lodge" (with the house, stable and other property referred to) but not to any more land which I may hereafter purchase adjacent."

The testimony of Mrs. Cropper, together with the letters of Mr. McLane to her, commencing March 25th, 1883, and extending to late in the summer of 1888, show that he always manifested the deepest and most tender affection for his daughter. Indeed, such seems from the testimony to

have been the fact to the date of the testator's death. And this affection seems to have been ardently returned by the daughter. True, there were some unpleasant episodes. One occurred when, on May 31st, 1887, Mr. McLane, in a letter to his daughter, announced his intended marriage to Miss Knight, and gave his reason therefor. In her reply, Mrs. Cropper, while avowing that she loves her father too tenderly and is too dutiful a child ever to embarrass him in one word or deed, yet says in speaking of the contemplated marriage, "I do not like, nor I never will like it, or be reconciled," with some other expressions that must have been very unpleasant to her father. On June 5th, 1887, he replies to his daughter's letter, saying, "I received your letter of the 2d inst., and read the same with profound emotion and only further recur to it to say that since our views, &c., &c., are now clearly defined to each other, my desire is for its subject to be forevermore a sealed one as between you and I." He then closes his letter with references to family relatives and friends in the usual style; and his subsequent letters to her were of the same considerate and affectionate character as theretofore.

Mr. and Mrs. Cropper attended the marriage of Mr. McLane in October, 1887, at Portsmouth, N. H., and apparently Mrs. Cropper and her father retained all of their former affection.

On the 30th of November, 1887, Mr. McLane invited his daughter and her husband to visit him at his Vermont Avenue home, and referred to a difficulty between Mr. Cropper and his sister, caused by a change in the religious views of the latter, to which it would appear Mrs. Cropper adverted in a letter to her father. After advising what he thought would be a proper course for Mr. Cropper in the matter—that it would be the better way to not speak of the subject, especially out of the family, he further says that from what he had heard, Mr. Cropper's sister is considering the propriety of making application to the courts for the transfer of the trusteeship of the estate to some other party upon the

ground that the excitement resulting from her change of religion has unfitted him to act impartially, and also that some California land interests of the estate have not been followed up. He does not espouse the cause of the sister in any particular, nor intimate his belief of the truth of the reports circulated against Mr. Cropper, but in language most wise and considerate counsels and advises a course that would lead to the restoration of peace and happiness in the Cropper family.

On October 11th, 1887, Mr. Cropper wrote Mr. McLane that his sister had just been told in the course of a visit to a personal friend, that Anne (his wife) and himself were behaving very badly in regard to his recent marriage, and that their chief objection was that he (Cropper) thought that he would not receive as much money from Mr. McLane as he (Cropper) had been in the habit of. He says: "I take this occasion to say that I never said anything of the kind." He says he had been asked several times since his marriage what allowance Mr. McLane made Anne, and "I have always answered that he made her none, as such, but that you had each year given her a very large and handsome Christmas present." Mr. Cropper then proceeds to say that Anne had been very guarded in speaking of the subject, and had always given answers when questioned in relation thereto with due respect to her father and herself. Mr. McLane on the following day answered, and as it is brief, we give it in full:

"My dear sir: In reply to yours of yesterday, I will only say that I regret you should think it necessary to make any explanations to me (or others), regarding the subject referred to; and trust that you will not again, resting assured, that hear what I may, I am far above even doubting the loyalty or affection or unselfishness, in their relations to me, of my daughter, or of her husband; and I hope I shall have as little reason to doubt their discretion in the matter.

"With love to Anne, I remain."

On the 27th of May, 1888, Mr. McLane wrote Mr. Cropper:

"In view of the contemplated move to Washington of you and my daughter, and of my desire that there should be no 'clouds' between us and our households; living specially in such proximity; (and also that no injustice may rest upon any one concerned) I am constrained to allude to a very personal and painful matter; briefly, then, it has come to my knowledge, and I am compelled from apparently irrefragable evidence, as it now stands, to believe it, that you have 'given expression' to unkind and unfriendly criticism and feeling in connection with the marriage, etc., of myself and my present wife; and to several persons, strangers no less than to intimates, all of which is still unatoned for, if not the reverse; and all of which 'expressions of opinion' should have been avoided and prevented, I think, by our past, present and future relations, ties and status. I shall be glad in your acknowledgment and reply to this, to learn and have your assurance that I have been misled and am, in any way, mistaken; for I am very solicitous that the future in all our lives may be, and as among ourselves, bright and stainless and happy."

It may be well to mention that on the 24th of May, 1888, Mr. Cropper had written a letter to Mr. McLane, thanking him for the proposed gift to Anne of money to build a house in Washington, and adverting to a passage in the letter of Mr. McLane to his daughter, in which the former proposed to give her a house, in regard to reports of an unpleasant nature. In this letter he says:

"I regret to see by your letter that reports have come to you which have hurt your feelings. I only wish to say on that subject that we are not responsible for them. Anne's affection for you has been too great for her to originate them, and I on my part have never said anything but that you made Anne a very handsome Christmas present, and until the trouble in our family caused by Rosina arose I do not think I ever mentioned the amount, and then to only two or three."

The only reply to this was in a letter of the 26th of May, 1888, by Mr. McLane, which we extract as follows:

"I have read carefully your remarks, on the other subject personal specially to myself, alluded to by you; and deem it proper for me to express the hope that, hereafter, matters to which I am the principal may be treated with due reserve by you."

In reply to the letters of Mr. McLane of the 26th and 27th of May, before quoted, Mr. Cropper on the 29th of the same month writes:

"You seem to think that what has been said in criticism of your present to Anne has originated with us. If you will recall our interview at the time of my engagement you will remember that I asked for nothing nor have I since made any such request. When your first check of \$1,000 came to Anne the year after our marriage my first impression was to ask her to tell you that I thought it too large, but when I considered the matter fully I came to think that an only child could accept anything from her father. I have invariably spoken of it as a very handsome present and no word of discontent has ever come from either of us. Until late I have never mentioned the amount, and for the last two or three years the amount has not been mentioned to my sisters. They knew that Anne had received a present, but the amount was not specifically told them. They most probably thought it was the same. Certain members of your family at the time of our marriage expected that you were to make a large settlement on Anne, and from time to time different members of your family have asked her if such was not the case. She simply said no, but made no comment and neither have I. Whatever has been said of an adverse nature did not come from us or with our advice. It has lately come to us that Anne's wardrobe was criticised by several. She has dressed herself exactly as she wished and with my approval. She has not spent her money entirely on her clothes; has bought several handsome things, among which is some lace, the counterpart of which none of her relations have. The whole amount of the present to

her has been spent by herself, on herself and as she wished, and no part of it has been spent on anything else.

"In regard to yours of the 27th inst., I would say that I have not made comments and criticisms on your late marriage. I have had many things said to me but I have not endorsed them. This spring while Miss Hunt was in New York, I had a conversation with her in which I was told that you had commissioned her through your wife in one instance and through Mrs. Knight in another to sound me on the subject. I talked very freely with her and sent an answer to be delivered to you by her. Whether you have seen her or not I do not know, but what I told her is what I now tell you. In many instances, both to the world and your family, before your marriage, I have defended the lady who is now your wife. Last autumn I wrote to you about a report which I have strong reason to believe came from the Emmets, as it came to me from a source with which they have intimate connections. As Anne and I have never said one word to the Emmets, either about what you gave her or about your marriage, I immediately wrote to you to stop what I considered pure malice. Your answer was that your loyalty to Anne and myself was too great to listen to or believe such reports.

"When I married I thought I should not only obtain a wife, but I hoped also to have a father, and to be to you a son (for no one who has not been an orphan can understand what it is) and tried to show it, as for instance, my care of you at Narragansett during your serious illness in the summer of 1883. It gradually appeared to me that it was not acceptable, and I tried to do my duty without being in the way.

"There is no one who wishes to be on good terms with his connections more than I, and I have always tried to treat Anne's relations with proper respect and consideration. I do not recall any occasion when I have slighted any of them. If there are any clouds between our households they are not of Anne's or my making. I have en-

deavored to be clear in what I have to say on this delicate and painful subject, but I think that a personal interview may be more satisfactory."

On 31st of May, 1888, Mr. McLane replied to the letter of Mr. Cropper of the 29th of May:

"My dear sir, I received yesterday your favor of the 29th inst., which has since occupied my serious attention. You refer specially to two subjects, *i. e.* 'criticisms' etc., regarding my gifts to my daughter Anne, since her marriage; and 'criticisms,' etc., in connection with my late marriage, etc. As to the former, I understand from your letter that neither yourself nor Anne is responsible in any sense for the origin in the conversations you have had about said gifts, etc. At the same time I must express my regret that you should have felt at liberty to discuss the subject to the extent you admit having done. I shall here let the matter drop and not seek further the authors of the intrusion into my private and personal affairs, to which I have taken objection. As to the latter subject, while greatly regretting also that my son-in-law should have become involved in its discussion, both in and out of my family, I accept, of course, your disclaimer of the grievance in the point of the inquiry I felt justified in making in my letter of the 27th inst., bearing upon alleged criticisms, etc., on your part in connection with my marriage, etc.

"Before closing I beg to say that in connection with the substance of an interview you report having had with Miss Hunt, I did not give her any such commission which you state she had from me, either directly or indirectly; the statement is absolutely erroneous and so I have never heard anything from her since, of course, about the matter, either from you or otherwise. I will add that both Mrs. Knight and Mrs. McLane disclaim all knowledge of such an intervention as is attributed to them. However, I know Miss Hunt to be incapable of intentional misrepresentation; and so, I suppose, a misunderstanding must somewhere exist to explain the preposterous and absurd supposition and

statement that I had commissioned Miss Hunt to sound you on the subject of my late marriage, etc. Perhaps the following may help to clear this delusion and fiction: Early in the year the statement was made to me, and with more consequence than usual, you had been talking about the subject before alluded to, and to those outside of my confidential circle, and wishing to clear up what, if so, etc., I deem an indiscretion, I asked Mrs. McLane to request Miss Hunt in her intercourse with Miss Cropper (which I assumed and supposed to be of this intimate nature, etc.) to mention substantially to her that these confidential personal matters were still being talked about here in the mutual circles, to my mortification, etc.; and so you would thus be, naturally by your sister, advised and warned about the same for your guidance, etc. I now regret that I did not write you direct; but I was trying at the time to avoid 'an explanation' of so delicate a nature, or rather to escape from the necessity of having one. I note your suggestion about a personal interview, but as I can see no wise object in the same, nor can discern any compensating results to flow therefrom, in view of detailed explanations, in connection with unpleasant matters, I beg to decline. I have not the slightest objection to the transfer of the credit from Riggs and think your proposed disposition of it both proper and wise. I remain yours sincerely."

A letter on the 2d of June and another on the 4th of June, and the replies of Mr. McLane thereto are in evidence, but we do not deem it necessary to say more than that while Mr. McLane insisted the subject must be dropped, he was evidently disappointed that Mr. Cropper should not be willing to admit it to have been an indiscretion to say anything to third persons in regard to the gifts of the former to his daughter or to permit himself to be questioned in relation thereto, or as to the marriage of Mr. McLane. It is evident that to Mr. McLane's mind the conversations which Mr. Cropper admitted with others than his wife were objectionable, and it is quite as evident that Mr. Cropper

did not concur with his father-in-law in that view. Mr. McLane raised no question of veracity with Mr. Cropper, but accepted his denials to the full extent, so far as they related to facts, but differed as to inferences and conclusions. This is clearly manifest by the letter of Mr. McLane of July 8, 1888, to Mr. Cropper, which it seems necessary to quote to a full understanding of this matter. It is as follows:

"Dear Sir: I have had further conference with Anne, in reference to the Washington 'M' street lot, alluded to in your letter of the 4th inst., and she understands that if she should desire to possess the said lot, to build thereon, I will in due season deed it to her, etc. As this move, if consummated, will involve your change of residence to close proximity to my own, I propose once more to make an effort to remove from between us the unsatisfactory, to me certainly, feature of our personal relations, as they now exist; since, without such removal, our social intercourse must, of necessity, be greatly interfered with. Our mutual self-respect can leave no other alternative; neither I think our mutual appreciation of what is and is not agreeable, in such relations, etc. Waiving details, etc., as I have heretofore explained, taking exception to your having 'talked,' discussed, etc., with third parties about certain of my personal affairs; and having in some instances, more or less, with some of those directly under my care and protection, (whether before or after my marriage) is not a material point. I am not taking exception to the holding or entertaining by you of opinions and views of these matters (however distasteful they might be to me, etc.) but to your having given expression to them or discussed them—especially as a son-in-law, and which, I consider, was a serious and grave liberty and requires atonement. I say 'especially as a son-in-law' because that relation entitles me to a great reserve on your part, and made you also in a measure irresponsible, from my natural indisposition to seek the explanations from a daughter's husband; with your own acknowledgments and avowals in the case, I will be now content to confront you

as the ground and substance of my complaint, and as the evidence of your 'indiscretion' as charged. In our late correspondence, I understand you substantially to say that you are unable to perceive wherein you have erred, etc., etc. My reply to all of which is that I (not you) am the judge. As you are aware, equally with myself, among honorable and responsible men in the world, if one considers that he has been insulted or offended by the word or deed of another, that other must make the necessary amends, etc. If the word or deed was not intended to offend, must still make to that effect satisfactory explanations, etc.; that is, he must disclaim all intentional offense and express his regrets for having given any occasion for any such impressions to have been received, etc. So, in this case of ours, I am, as I have repeatedly informed you, offended by reason of certain of your references to me and mine; and it is not sufficient for you to say that you never intended yourself to be repeated, or for me to hear of what you thought or said; that was one of the chances and responsibilities you took when you allowed yourself to 'talk,' etc., and it is for me to decide whether or not I have a right to be offended thereat. I think, in our mutual justification, as honorable men, with proper self-respect, you should accept my 'right' as explained and illustrated and as the sequence admits, etc., your absence of 'right' and justification for your 'talk,' etc., as complained of, and then, I think, with the disclaimers made heretofore, you will have no difficulty in acknowledging, freely and frankly, without reservation the 'indiscretions' I complained of; and of expressing your regrets for their occurrence. If you can not thus satisfy me you will leave me no choice but to accept the remaining alternative alluded to."

Mr. Cropper in reply of July 14, makes an explanation, and expression of regret with which in his response Mr. McLane declares himself satisfied. But Mr. Cropper then proceeds to mention some grievances of his own:

"I would add that I agree with you in all your remarks

touching the customs that hold among honorable men, including the fact of the aggrieved one being the judge of the affront. You and I are both in middle life, as it were on the same footing, and as I make no doubt you will be as ready to atone as to ask amends from me, I now mention that about which I have remained silent for Anne's sake. I refer in the first instance to the rudeness shown to the members of my family, and thus to me, by you and the members of your household at the time of my wedding. The particulars I omit for brevity's sake, but will furnish them if you desire; in the second place, your discourteous manner to me last summer while I was a member of your household at Gillian Lodge, and during my visit to your house in Washington last winter; and in the third place, the concluding paragraph of your letter of June 5, in which you tell me that you consider my offer to accommodate matters a nullity. In all these matters I consider myself aggrieved. Hoping that this clears the whole affair, and that when your answer is received there will be no cloud left in our social atmosphere, I remain yours very truly."

Mr. McLane in reply accepts the explanations of Mr. Cropper as to the subject of their previous correspondence, and then in relation to charges of rudeness and discourtesy made by Mr. Cropper says:

"Rudeness is a strong and heavy term, when used in a personal sense, and forms a charge serious and grave in the extreme, and under present circumstances I feel it specially so in having the accusation applied to me. I have consulted the 'members of my household,' Mrs. Knight and Mrs. McLane, and they unite with me in disclaiming any intention to have been rude at the period referred to, and regret with me, if they gave any occasion for such impressions to have been received. Again, you say, 'in the second place, your discourteous manner to me last summer while I was a member of your household at Gillian Lodge, and during my visit at your house in Washington last winter'—as before, to be charged with discourtesy of manner to a

guest under my own roof, is a serious and heavy, and not to say a very unpleasant accusation personally. I can only add, in connection with it, that I am unaware to what you refer, or of having given any occasion for the charge; and while I would be quite prepared under the circumstances to express regret for causing the impression to have been received, necessarily you must indicate if you care to pursue the matter further, the special discourtesy of manner on my part to which you took exception. Again, you say, 'and in the third place, the concluding paragraph of your letter of the 5th of June, ult., in which you tell me you consider my offer to accommodate matters a nullity.' 'In all these matters I consider myself aggrieved.' As I understand this letter of yours (of June 4) you decline to satisfy me on the points to which I have taken exception; and at the same time, make an offer of amity and harmony it is true, but which in view of the previous declarations, appeared to me to be without efficacy, and consequently void, or a 'nullity,' a simple English word to convey the meaning; and I certainly meant no disrespect to you in its use. In conclusion and referring to your first stated instance of grievance, I must request that you will advise your sisters of my reply to your charge against myself and family of rudeness towards them on the occasion of your marriage."

On the 18th of June, 1888, Mr. Cropper responded to Mr. McLane as follows:

"Yours of the 16th inst. reached me yesterday, and I would say that in regard to the two first subjects I am quite satisfied. I have conveyed your message to my sister Kate as you asked, but she, in the course of events and her wish to be at peace with the world, has long ago overlooked anything which might have been unpleasant to her; and I would add that what is now said comes entirely from me and in no way from her. Miss Rosina Cropper for her own purpose has cultivated her connection with your household lately. She sailed for Europe on Saturday, and as my communication with her has entirely ceased I cannot deliver

it to her. My statements seem to take you by surprise, therefore I will go into details, as I think it only your due, although it is far from my wish to prolong the discussion. At the time of my marriage my sister's were as you knew two women entirely alone in the world. Instead of taking this into consideration you filled the only available room in your house with one of the bridesmaids on the ground that her father and mother could not come to Washington. Mrs. Emmet was going to a hotel with her daughter and another bridesmaid and as she was a personal friend of Miss Potter, could have taken charge of her. At wedding receptions it is customary for the representatives of the two families to receive together, but no such invitation was given to my family and they were allowed, to use a slang expression, to shift for themselves. Your brother Robert found my sister Kate standing alone in a corner and introduced himself, saying she must be Miss Cropper from her likeness to me. I was anxious to have her meet Miss Hunt and I had to send three messages to the lady who is now your wife before she introduced her. There was no attention shown them at supper, and even their wedding cake was given them by an outsider. The next day Miss Potter left and although my sisters were alone in a hotel, Miss Noxton was asked to fill Miss Potter's place. You and your present wife called upon them at the hotel, and after learning that they were going to Baltimore, asked them to dine on Thanksgiving with you."

Mr. McLane replied on the 20th of July, 1888, as follows:

"Dear Sir: I have received and carefully noted the points of your letter of the 18th inst., and find there remains for me to supplement the following remarks and explanations to those I have already made, etc. Regarding the birthday gift of stag horns, I am under the impression I returned my acknowledgments to you for them in a letter to Anne, and written in reply to one from her referring to your intention of sending them to me. If I did not do this, and failed also in expressing my thanks to you in person when

you handed them to me at Gillian Lodge, I certainly failed in due courtesy to you, and which in such case, I sincerely regret. Further, regarding your third stated grievance, I would add that I did not intend, when using the word 'nullity,' to convey the idea in anywise to imply that 'you had told a falsehood;' and regret that you so considered (or received such impression, which you state you did); and in doing so I think you did both yourself and me an injustice. In again closing, so far as I can see ahead—on my part—this painful correspondence with its responsibilities, I should be wanting in self-respect, and in frankness, if I did not say to you (and yet more directly and emphatically than in my last reference to the subject) that I think you are unjustified in prejudging the case, that is, in advance of a hearing from us—and under the circumstances show a want of due personal respect towards us, in applying to me and 'the members of my household' the term 'rudeness' when you informed me that in your opinion we, on the occasion of your marriage, had failed in our obligations to your sisters."

"July 21, 1888.

"Allan McLane, Esq.—Dear Sir: Yours of the 20th instant reached me this morning, and in acknowledgment thereof I would only say one word more, that I am sorry that you constitute yourself the sole judge on your side but you are not willing to accord the privilege to me.

"I am yours very truly,

JOHN CROPPER."

Mrs. Cropper testified that after the date of this letter of July 21, until they came to live in Washington the relations between her husband and her father were very strained. After they came to Washington, which was in September, 1889, they (her husband and father) became affectionate again and that this relation apparently continued until her father's death, more than two years afterwards.

We have thus lengthened this opinion by introducing

these letters, because it is from what is thereby disclosed very largely that the counsel for caveators argue that undue influence was exerted upon the testator, causing him to give to his daughter a less portion of his estate than he would if left to himself. They say that stories were manufactured by somebody about expressions and criticisms by Mr. and Mrs. Cropper as to the gifts of Mr. McLane to his daughter, and about the marriage of Mr. McLane, and these were carried to Mr. McLane by Miss Hunt, or some one else, either directly or through Mrs. Knight or Mrs. McLane, or both. This theory seems to be demolished by the very letter introduced to support it. They show that the correspondence which at first commenced about the reports and stories in circulation was continued until the matter of difference was narrowed down to what Mr. Cropper admitted he had said, and to Mr. Cropper making the proper reparation for that. Upon Mr. Cropper expressing his regret for having said that which he admitted he had said, Mr. McLane promptly expressed himself satisfied. Thereupon a new element of trouble was introduced by Mr. Cropper, charging Mr. McLane and his family with rudeness and the former with discourtesy, which did result in strained relations.

It is unnecessary that we should discuss this matter of difference between these parties, or undertake to determine the merits of the controversy. If it be admitted that his affection for his daughter was somewhat chilled by this last controversy, and that he executed the codicil to his will transferring "Gillian Lodge" from his daughter to his wife while under the influence of that feeling, it cannot affect the validity of the codicil.

If a testator by his will gives to one who would inherit from him were he to die intestate a portion less than would be inherited by the same person in case of intestacy, because of resentment against that person, growing out of an actual controversy between the testator and the legatee, the will would be in nowise invalidated by that circumstance.

This solution of the question also disposes of whatever may be in the letters of Miss Hunt, for her statements, whether authorized or not, related to reports and stories which were discussed and disposed of by Mr. McLane and Mr. Cropper in the correspondence we have just considered.

Neither can it be presumed that the will of Mr. McLane was executed under the influence of any such reports or stories as to what had been said by the caveators about his gifts or his marriage. There is certainly no direct proof tending to establish such a fact. And it seems to us that in view of what this record conclusively establishes the character of the testator to have been, no reasonable person can read his letter of May 27, 1888, where he first addresses Mr. Cropper about these reports in the most considerate and delicate terms, and then for a moment presume that he had two months previous to that executed his will in which he discriminated against his daughter on account of enmity against her or her husband, engendered by these reports, without making any inquiry or investigation to determine the truth or falsity thereof. He shows at all times an impatience even against permitting anything in the nature of a misunderstanding to remain without correction at the earliest possible moment.

But it is said that this is an unjust will. Mrs. Cropper received from her father, after the execution of the will, \$16,500 to build a house, and by the will \$10,000 insurance (to which she was entitled without the will, it is true, nevertheless it was provided by the testator and with his money), the water lot in San Francisco, \$1,800, "Gillian Lodge," \$30,000 absolutely, and some other articles of personal property, of no great commercial value, making \$58,300 absolutely by the will. She also by one-half of the residuum of the property placed in the hands of a trustee became entitled to the income of what is fairly estimated at \$170,000. It is true that this is not quite one-half of the testator's estate; but if his design was to place his wife and daughter in something like equal circumstances in life, he would naturally

look to their situation without his bounty. His wife would be without any support substantially, while his daughter's husband was amply able, as we are advised by the testimony, to support her in a manner comporting with what had always been her station in life. The income which she would receive from her father's bounty, joined to that of her husband, would enable herself and husband to live comfortably and to gratify all reasonable tastes, their station in life considered, while that which was left to Mrs. McLane would be considerably less and would require greater economy of expenditure. By the will the portion left to Mrs. Cropper's use during life went to her children, if she left any, absolutely; to those (excepting her husband) nearest to her and the testator. The fact that he left the most of his daughter's portion in trust for her does not in our judgment militate against the justice of this will. Prudent fathers are constantly making such provisions in their will, especially as to daughters. By arranging his devise for the benefit of his daughter in that way, he secured a double guaranty for the support of his daughter; first, by her husband; and second, by the fortune that he placed in the hands of a trustee for her benefit.

Viewed in the light of these considerations, we are not at all prepared to say that the will is unnatural, unwise or unjust. He doubtless loved his wife devotedly, as well as his daughter, and intended to be just as between the two, as we think he was. But little need be said of the codicil, in addition to comments already made. He may have transferred "Gillian Lodge" to his wife because of the fact that after the execution of his will he had provided a home for his daughter in Washington, and because upon reflection he thought there would be a nearer approach to equality than without such transfer, all things considered, as between his wife and daughter.

These considerations disposed of the alleged item of evidence of undue influence arising from the claimed fact that the will is unnatural and unjust. But it is said that the

testator, in contemplation of marriage, declared his purpose to his daughter to make a different disposition of his property, and one more favorable to his daughter than the one actually made by his will. While such a circumstance is always admissible to be considered with other evidence for what it may seem in each particular case to indicate, it is never sufficient, unsupported, to set aside a will. In a case like this, with such a testator, and such a will, with no more support than it has in this case, it is not in our judgment entitled to the consideration of a jury.

Again, it is testified by Mrs. Cropper that at the first visit made by her to her father after his marriage at Christmas, 1887, and again in May, 1888, Mrs. McLane was always present in order, as she surmised, to prevent any private conversation between her and her father. On cross-examination she admitted that Mrs. McLane and her mother frequently went out driving, leaving her father and herself at the house, and that either might have introduced any subject they might desire to discuss. She says her father did not speak of the disposition of his property, and she never in her life thought of introducing such a subject. This should be considered in connection with her statement, that after the execution of the codicil, in August, 1888, she had many interviews with her father alone during her visits to him, and that after September, 1889, there was full and free intercourse between the families and their members, including Mr. Cropper, until the last sickness of Mr. McLane, which was but of a few days' duration.

Again, Mrs. Cropper says that she was not admitted to see her father during his last sickness. She says that on one occasion she was told by the physician in attendance that no one but the necessary attendants should be admitted, and that she was always told that it was by order of the physician that she was not admitted. She says that when her father was very near his death, she was sent for, but she found him unable to converse. Doubtless it was a severe trial to one so devoted as Mrs. Cropper is shown to

have been to her father, not to have been present during his last sickness, but such regulations are frequently absolutely necessary, and in the absence of any testimony showing a sinister motive, none should be presumed.

We come now to the consideration of the exceptions of the caveator to the refusal by the court to admit evidence.

When the letter of Mr. McLane had been read, in which he mentioned that he had heard that Miss Rosina Cropper intended to apply to the courts for his removal as trustee because of his failure to look after the interests in some California property, counsel for the caveatees asked Mrs. Cropper whether in point of fact her husband had anything to do with the California property. We do not think that it could properly have made any difference with the jury whether Mr. McLane believed this report or not, or whether it was true or not. Mr. McLane did not profess to believe it; he had heard it, and he was communicating what he heard so that Mr. Cropper might seasonably avoid trouble.

The second exception was to the refusal of the court to permit Mrs. Cropper to testify to the statements of Miss Hunt, made to her personally. This ruling was correct. The letter offered by the caveators of Mr. McLane of May 31st shows that he only authorized Miss Hunt to speak to Miss Cropper about the reports in order that she might warn her brother. Of course that did not constitute Miss Hunt the general agent of Mr. McLane to talk to whom she pleased.

The third exception is to a refusal of the court to admit a letter written by Miss Hunt on June 3d to Mr. Cropper. This ruling was also right, for the reason before given. She had no authority from Mr. McLane to write it, and without it, her letter would be no more admissible than the letter of any other individual.

The fourth, fifth, sixth and seventh exceptions being because of the refusal of the court to permit certain letters written by Miss Hunt to sundry persons to be read in evidence, were rightly excluded by the court for the reasons before given.

The eighth and ninth exceptions are evidently not well taken, the eighth for the reasons before given as to Nellie Hunt, and the ninth because the testimony related to what Mr. McLane said about the influence of James L. McLane in procuring the will of Gen. Joseph Johnston, a matter clearly irrelevant to the issues in this case.

In conclusion, it is proper that we should say that when the motion was made to the court in special term after the caveators had offered their evidence, and rested, to direct the jury to return a verdict in favor of the validity of the will, it became the duty of the court, if in its judgment, considering all the evidence that had been offered, no reasonable mind could have properly come to the conclusion that the fact of undue influence or fraud had been proved, to sustain the motion and direct a verdict accordingly. The special term did sustain the motion, and directed a verdict for the caveatees.

We have carefully reviewed the testimony so offered in the special term, and the rulings of that court to which exceptions were taken, and are of the opinion that no error to the prejudice of the caveatees is shown.

The order of the special term in overruling the motion for a new trial is therefore sustained.

UNITED STATES, EX REL. NORTON W. WELTON

vs.

THOMAS H. CARTER, COMMISSIONER OF THE
GENERAL LAND OFFICE.

MANDAMUS; REVIEWING ACTION OF PREDECESSOR; LAND PATENTS.

1. The Commissioner of the General Land Office cannot cancel or annul the action of his predecessor.
2. Unless there is a plain duty on the part of an official as to which there is no room for discretion, the remedy by *mandamus* is inadmissible.
3. After a patent for land has issued, it can never be recalled by the Executive Department. It can only be set aside by a suit in equity by the United States, on the ground of fraud.

At Law. No. 32,339. Decided February 13, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Application for a writ of *mandamus*, heard before General Term in the first instance. *Petition dismissed.*

The facts are stated in the opinion.

MR. C. W. HORNOR for the relator.

MR. C. C. COLE, U. S. District Attorney, for the Commissioner.

Mr. Justice COX delivered the opinion of the Court:

This is an application for a *mandamus* against the Commissioner, requiring him to take up and decide an alleged appeal from the register and receiver of the Land Office at Pueblo, Col.

Mexico, before the treaty of Guadalupe Hidalgo, had granted a large tract of land to certain Vigil and St. Vrain. By an act of Congress passed in 1860, this was confirmed to the extent of 97,650 acres, but it was provided that surveys should be made of tracts occupied by parties holding under Vigil and St. Vrain. And by another act of 1869, 15 Stat.,

275, it was provided that the claims of parties thus holding, which might be established to the satisfaction of the register and receiver of the proper land district, should be adjusted according to the subdivisional lines of survey, so as to include the lands so settled upon or purchased, and the arrears of the same should be deducted and excluded from the just limits of the claim of Vigil and St. Vrain; and on the adjustment of the claims the surveyor-general was to furnish to the claimants approved plats which should be evidence of title.

It turned out, on the survey, that the aggregate of the claims exceeded the total amount of land allowed to this grant by the United States, so that the several claimants were at once brought into conflict, inasmuch as the claims of no one of them could be fully satisfied except at the expense of some other one.

The register and receiver awarded to William Craig 71,251⁸⁸/₁₀₀ acres. The consequence was that the relator in this case and a number of other claimants received much less land than they claimed. The relator and others appealed from the decision of the register and receiver to the commissioner of the land office in 1874. Craig claimed before the commissioner that the decision of the register and receiver was final and moved to dismiss that appeal. The commissioner—then Burdett—referred the question to the Secretary of the Interior—then Delano—who advised that the commissioner ought to entertain the appeal. His advice was founded upon the act of Congress of July 4, 1836, found at 5 Statutes at Large, page 107, which provides:

“That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commis-

sioner of the General Land Office, under the direction of the President of the United States."

Taking advantage of this last clause of the law, Craig appealed to the President, who consulted the Attorney-General, and then, on the 2d of March, 1877, made an order directing the Commissioner of the Land Office to instruct the Surveyor-General to deliver to Craig an approved plat of the land adjudged to him by the register and receiver of the Pueblo land district. This was done under the direction of the then Secretary of the Interior, Chandler, and on January 8, 1878, a patent for the land was delivered to Craig. This action necessarily overruled and disposed of the relator's appeal, because it took away the whole subject-matter to which it related, by transferring from the United States to Craig, the complete title to the land, which was in part claimed by the relator.

In June, 1888, more than ten years afterwards, the relator applied to the then commissioner of the land office to take up and consider, as a still pending appeal, the appeal aforesaid, taken in 1874. The assistant commissioner, Anderson, considered the application and denied it, holding the former action of the executive to be binding and conclusive. An appeal was taken to the Secretary of the Interior, which was dismissed on the 10th of September, 1891.

The present application was made on the 19th of November, 1891.

It appears, then, that the appeal of the relator taken in 1874, from the register and receiver of the Pueblo land office, was definitely decided and disposed of in 1877, by both the Secretary of the Interior and the Commissioner of the General Land Office, who were predecessors of the present incumbents of those offices.

The present application is for a mandamus requiring the present Commissioner of the Land Office to take up and act upon the appeal taken from the register and receiver of the Pueblo land office, as an appeal still pending and undisposed of.

In point of fact, the appeal was, as we have seen, acted upon and disposed of, and the only ground upon which the present application could be granted would be, that it is the plain ministerial duty of the present commissioner to review and reverse the decision of his predecessor and to treat the previous action of the Executive Department as a mere nullity.

Whether the action of the previous commissioner in overruling the appeal of 1874, from the register and receiver, in obedience to the President's direction, was erroneous or not, it was not a nullity, for it was within the jurisdiction of the commissioner to decide upon the appeal, and he did so, and from that moment it ceased to be pending before him.

If an application had been made for a mandamus to require him to consider the appeal when it was yet unacted upon by him, the relator might, perhaps, have been entitled to it, but after it was decided and disposed of it is quite a different question whether his successor in office can be called on to consider it.

There are, doubtless, many questions which it is incumbent on the officers of the Executive Departments to decide, and if they should refuse even to consider them, it may be that the parties interested would be entitled to the remedy of mandamus to compel a determination of them by the proper officers. But when they are once decided by the officers having jurisdiction to decide them, we know of no general law which makes it the duty of their successors in office to reopen such questions and decide them anew, and certainly no such law applicable to a case like the present. And yet, unless there be a plain duty of this kind, as to which there is no room for discretion, the remedy by mandamus is inadmissible.

Not only is it not the duty of the present commissioner to review the action of his predecessor, with a view to reversal, but it is not in his power to do so.

The decision of the department in 1877 resulted in a patent from the United States to Craig of the lands awarded

to him by the register and receiver. This might, perhaps, have been prevented by the relator, by a timely application for a mandamus or injunction; but now that the patent has issued, it could never be recalled by the Executive Departments. It could only be set aside by a suit in equity by the United States, on the ground of fraud. A reconsideration of the questions which antedated the granting of the patent would be perfectly useless.

This case is controlled, as we think, by a decision only recently rendered in the Supreme Court of the United States, in the case of John W. Noble et al., appellants, *vs.* The Union River Logging Railroad Company, 147 U. S., 165. The act of Congress of March 3, 1875, provided that a right of way through the public lands of the United States be granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization, under the same, to the extent of one hundred feet on each side of the central line of said road. Section 4 of the act provides that any railroad company desiring to secure the benefits of the act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

The Union River Logging Railroad Company had been incorporated, and had supplied the evidence provided for in the act of Congress. A profile of the road had been submitted to Secretary Vilas, and he had approved it, and it was noted upon the plats in the office. Afterwards, upon

the suggestion that this railroad company was not a railroad company for public purposes, but merely for private business interests of the company, Secretary Noble undertook to reconsider and reverse the action of his predecessor.

It is sufficient to refer to a small part of the opinion of the court. They say:

"Upon the other hand, if the patent be for lands which the land department has authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *Smelting Company vs. Kemp*, 104 U. S., 636-640:

"In that respect they (the officers of the land department) exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. . . . In *Moore vs. Robbins*, 96 U. S., 530, it was said directly that it is a part of the daily business of officers of the land department to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority of control of the Executive Department over the land and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government.'

"We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled

to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. . . . If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void.* As was said by Mr. Justice Greer, in *U. S. vs. Stone*, 2 Wallace, 525-535:

“‘ One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.’ ”

According to this authority, not only was it not the duty of the present commissioner of the land office to take up and review the action of his predecessor, but had he attempted it, we would be bound to enjoin him from doing so, upon a proper application.

In addition it may be mentioned that this application was made fourteen years after the appeal was taken to the commissioner, and was disposed of in the manner already referred to. We think it is incumbent upon us, therefore, on all these grounds to *deny the application for a mandamus.*

IN THE MATTER OF THE APPEAL OF
CHARLES E. CHINNOCK
FROM THE COMMISSIONER OF PATENTS.

1. An appeal will not lie to this court, from any ruling of the Commissioner of Patents, on the admissibility of amendments to specifications.
2. The court will review the decision of the Commissioner on claims as they are presented to him for final decision, either in the shape in which they were originally made, or as amended with the leave of the Patent Office.

No. 90. Patent Appeals. Decided March 13, 1893.

The CHIEF JUSTICE and Justice COX sitting.

Hearing on an appeal from the Commissioner of Patents.
Affirmed.

The facts are sufficiently stated in the opinion.

Mr. EDWIN H. BROWN for applicant (appellant).

Messrs. GUSTAV BISSING and W. S. CASE for the Commissioner of Patents (appellee).

Mr. Justice COX delivered the opinion of the Court :

The appellant filed an application in the Patent Office on the 28th of December, 1878, for letters patent for certain improvements in telephones.

His application was rejected by the primary examiner, by the examiners in chief on appeal, and finally by the Commissioner of Patents, on appeal to him.

From the decision of the commissioner an appeal is taken to this court.

The reasons for appeal, filed by the claimant, are as follows, viz:

1. For that, in said decision, it was not held that the device of said Chinnock, set forth in his application, was a practical contact speaking telephone.

2. For that, in said decision, it was held that the said Chinnoek was not, at the time of the preparation of his application, in possession of knowledge of the principle involved in a speaking telephone.

3. For that, in said decision, it was not held that a variable contact of the electrodes of the telephone set forth in the application, and electrical undulation, were contemplated.

4. For that, in said decision, it was held that said Chinnoek was attempting to construct a telephone transmitter which operated on the make and break principle.

5. For that, in said decision, it was held that the amendments tendered by said Chinnoek, after the rejection of his application and subsequent to the interference were not permissible.

6. For that, in said decision, it was not held that said Chinnoek had set forth his improvement in his specification and drawings in terms sufficiently full, clear and exact to enable one skilled in the art to make and practice his invention.

7. For that, in said decision, it was not held that Chinnoek was entitled to a patent because he had made an improvement in a telephone, regardless of whether such telephone was a speaking telephone.

With regard to the last of the reasons, it is proper to say that as the applicant contended before the office that his device was an operative speaking telephone, we have no doubt that such was intended to be his invention and such he would claim it to be if a patent should issue, and we do not think that a patent should issue on any other ground.

As to the sixth reason, we do not find that the commissioner's decision embraced the point mentioned in it.

With reference to the fifth reason, viz: The commissioner's holding that the amendments to his specification, tendered by the applicant, were not admissible, we have to remark that no appeal to this court is provided for in the statute, from any ruling of the office on the admissibility of amendments to specifications. We understand that we are

to review the decision of the commissioner on the claims as they are presented to him for final decision, either in the shape in which they were originally made or as amended with the leave of the office.

The other reasons relate to the grounds on which the application was rejected on its merits.

The commissioner, following the decisions of the primary examiner and examiners in chief, held that the invention described by the applicant was not an operative, variable contact speaking telephone and that the principle of such a telephone was apparently unknown to the claimant at the time he filed his application, as, in fact, it was a novelty in the art: that his device was rather on the make and break principle, and for that reason, not adapted to the transmission of articulate speech, while it might be to the transmission of some sounds, such as musical tones.

We have examined the opinions of the examiners and of the commissioner, and the arguments of counsel, and have been unable to see that the commissioner was in error in his decision. It is therefore *affirmed*.

ALBERT WADDILL, USE OF FRANK P. CHRISTIAN, ADMINISTRATOR OF EDWARD D. CHRISTIAN

vs.

WILLIAM D. CABELL.

JUDGMENTS; SCIRE FACIAS; EXECUTION; LIMITATIONS.

1. There are three remedies upon a judgment: first, an execution; second, a writ of *scire facias* if execution is delayed, which results in a new judgment; and third, an action of debt, which also results in a new judgment.
2. An action of debt cannot be maintained in this District upon a judgment after it has been of twelve years' standing.
3. In this District there can be no proceeding upon a foreign judgment other than an action of debt, and the right of action accrues when the judgment is rendered.
4. The statute of limitations in applying to bonds, judgments and other specialties, etc., embraces both foreign and domestic judgments.
5. A right of action upon a foreign judgment is subject to the law of limitations of the *forum* in which it is attempted to be enforced.
6. An execution issued in a foreign jurisdiction on a judgment rendered there, is not a judicial determination of anything, and is not an act to which full faith and credit is to be given by the courts of another jurisdiction, within the meaning of the Constitution and the act of Congress of May 26, 1790 (1 Stat. 122). Such an execution can have no effect in another jurisdiction.
7. No recovery can be had in this District upon a judgment of the State of Virginia, where the judgment was obtained more than twelve years prior to the attempt to enforce it here, and more than twelve years elapsed during which no effort was made to enforce it in that State, notwithstanding a Virginia statute which kept the judgment alive in that jurisdiction until the filing of the action here.

At Law. No. 28,383. Decided March 13, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing upon a bill of exceptions taken by the defendant in an action of debt on a judgment. *Reversed*.

The facts are stated in the opinion.

Mr. O. D. HALLAM for plaintiff (appellee).

Messrs. HENRY WISE GARNETT and CONWAY ROBINSON, Jr., for defendant (appellant).

Mr. Justice Cox delivered the opinion of the Court :

This is an action of debt brought in this court upon a judgment rendered in the circuit court of Nelson County, Virginia, for \$1,166.66, with interest from July 13th, 1868, with costs. It appears that on the 26th day of October, 1869, one month after the rendition of the judgment, a writ of *feri facias* was issued, and in January, 1870, this writ was returned *nulla bona*. There were no further proceedings in Virginia upon this judgment until June 20th, 1887, seventeen years after the issuance of the first writ of *feri facias*, when another writ of *feri facias* was issued which was returned *nulla bona* in the following September. On January 14th, 1888, less than a year after this last return, the present suit was brought in this court which is an action of debt.

The defendant filed seven pleas. Issue was joined on three of them. They are: First, that he is not indebted as alleged; second, that there is no such record as alleged in the plaintiff's declaration, and, fifth, that the cause of action did not accrue within twelve years previous to the institution of this suit.

The other pleas are somewhat voluminous, but they are only variations of the plea of the Statute of Limitations; that is, the act of the Assembly of Maryland of 1715, which provides: "That no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, &c., shall be good and pleadable or admitted in evidence against any person or persons of this province after, &c., the debt or thing in action is above twelve years' standing." These pleas were demurred to and the demurrer was sustained.

A jury was impanelled to try the issue joined on the other pleas. At the time of the trial this judgment was offered in evidence and objected to upon the ground that it was no longer good or pleadable within the statute. The objection was overruled and the judgment was admitted in evidence. Then, at the close of the plaintiff's case, the defend-

ants objected upon the same ground, and asked for an instruction that the jury should find for the defendant, which was refused. Finally, the defendant asked a long instruction, which embodied the whole history of the case and is intended to cover all the points that could be made, and which is as follows:

"If the jury believe from the evidence that on the 28th day of September, A. D. 1869, A. Waddill, for the benefit of Ed. D. Christian, recovered a judgment against William D. Cabell in a certain cause in the circuit court of Nelson County, in the State of Virginia, for the sum of \$1,166.66, with interest thereon from the 13th day of July, 1868, till paid, and costs of said suit; and if the jury further believe from the evidence that on the 26th day of October, A. D. 1869, upon said judgment in said cause a writ of *feri facias* was issued by the clerk of said court to the sergeant of the city of Lynchburg, returnable on the first Monday of January, A. D. 1870, and that said writ of *feri facias*, on November 11, 1869, came to the hands of a certain George H. Burch, sergeant of said city of Lynchburg, and that thereafter a certain C. Clark, deputy sergeant for said George D. Burch, sergeant, returned said writ of *feri facias* 'no effects,' and that said writ was so endorsed; and if the jury further believe from the evidence that thereafter, on the 20th day of June, A. D. 1887, upon said judgment in said cause another writ of *feri facias* was issued by the clerk of said court to the sheriff of Nelson County, returnable on the first Monday in September, A. D. 1887, and that said latter writ of *feri facias*, on June 20, A. D. 1887, came to the hands of a certain M. K. Estes, sheriff of said Nelson County, who thereafter returned the same 'no effects,' and that said writ of *feri facias* was so endorsed; and if the jury further believe from the evidence that there has been no credit entered upon said judgment nor any partial payment made on account thereof since its rendition, and that there has been no new promise to pay the same nor any part thereof, nor any acknowledgment thereof or of any liability on account thereof

since its rendition; and if the jury further believe from the evidence that no writ of *scire facias* ever was issued upon said judgment and that no writ or writs of *feri facias* ever issued upon said judgment and no return or returns ever were made upon any such writ, with the exception of the two writs of *feri facias* and the returns thereon above mentioned or referred to; and if the jury further believe from the evidence that much more than twelve years have elapsed since the rendition of said judgment and that much more than twelve years elapsed between the return of said writ of *feri facias* and the issuing of said second writ of *feri facias*, without any continuances being entered or any step or proceeding whatsoever being had or taken upon said judgment or in said cause between the return of said first writ of *feri facias* and the issuing of said second writ of *feri facias*, and that the issuing of said two writs of *feri facias* upon said judgment and the return of each of said writs, as above mentioned, constitute the only steps or proceedings in said cause since the rendition of said judgment, then the jury are instructed that if they so believe from the evidence, the plaintiff's cause of action is barred by the statute of limitations, which has been pleaded, and that they must find a verdict for the defendant."

This instruction was refused, and thereupon the court instructed the jury that upon the evidence the plaintiff was entitled to recover, to which an exception was taken.

So that it will be seen, that in various forms, but one single question is presented in this record, and that is, whether this action upon a Virginia judgment, recovered in 1869, is barred by our statute of limitations.

It may be well first to consider the operation of that statute in reference to domestic judgments. We all know that when a judgment is recovered it constitutes a new cause of action on which there are three remedies; one, an execution; another, a writ of *scire facias*, if execution is delayed, which results in a new judgment; and the third, an action of debt, which also results in a new judgment. It is perfectly

clear that an action of debt could not be maintained upon a judgment here after it had been of twelve years' standing.

In the case of *Mullikin vs. Duvall*, 7th G. & J., 355, it was decided that a judgment cannot be revived by *scire facias* after a lapse of twelve years, and in that case the twelve years were held to be computable from the date of the judgment without regard to the execution. We know that the English practice was to issue a writ of *fieri facias* and have it returned *nulla bona* and then continuances were to be entered up from term to term and a new writ taken out at any time thereafter. That practice is recognized by the circuit court in the case of *Digges vs. Eliason*, 4th Cranch C. C., 622, and was also recognized by us in the case of *Thomson vs. Beveridge*, 3 Mack., 170. We held that where more than twelve years had elapsed from the return of the original *fieri facias* and it was undertaken, without entering up the continuances, to issue a new writ, the plaintiff was as much barred by the lapse of time as he would be to bring an action of debt or to issue a *scire facias*.

In the State of Virginia, the remedies upon a judgment are very much the same as here, but a judgment is allowed a longer life. The statute of Virginia provides that on a judgment, execution may be issued within a year and a *scire facias* or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a *scire facias* or an action may be brought, within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return.

Of course, in this District, there can be no proceeding upon a foreign judgment other than an action of debt, and that action accrues when the judgment is rendered. It is very plain that the statute of limitations, in general terms, applying to bonds, judgments and other specialties, &c., will embrace both foreign and domestic judgments as much as it will embrace specialties executed elsewhere than here;

and it is very well settled that any right of action upon a judgment of another State or of another jurisdiction is subject to the law of limitations of this forum, when it is attempted to enforce it here.

That was decided by the Supreme Court very clearly in the case of *McElmoyle vs. Cohen*, 13 Pet., 312, and *Bacon vs. Howard*, 20 How., 25, and also, in Maryland, in the case of *Duvall vs. Fearson*, 18 Md., 504.

A question was made in the case of *Digges vs. Eliason*, 4 Cranch, C. C., as to the meaning of the words "twelve years' standing." The court there held that it should be interpreted to mean twelve years' standing without any proceeding towards the enforcement of the judgment. In that case a *scire facias* had been issued upon the judgment within twelve years from its date and a new judgment rendered; and then within twelve years from that date, but more than twelve years from the date of the original judgment, a new *scire facias* was issued, and then the statute of limitations was pleaded. That was the case to which the court applied the language: "Twelve years' standing means standing without any proceeding towards enforcing payment." But there the action was upon a new judgment and, of course, any proceeding upon that judgment was lawful within twelve years from its date. The language of the court, however, was comprehensive enough to embrace the case of a *feri facias* issued and returned *nulla bona*,* as the last proceeding to enforce the judgment, and assuming that to be the case, in the case of *Thomson vs. Beveridge*, as I have already stated, we held that there could be no further proceeding by way of entering up continuances and issuing a new *feri facias* after twelve years from the date of the last proceeding.

There could be no such proceeding, of course, upon a foreign judgment. There is only one proceeding, and that

* NOTE.—The doctrine that "twelve years' standing" means twelve years from the date of the last *feri facias* issued and returned, is overruled by the Court of Appeals in the case of *Galt, Ex. vs. Todd et al.*, 23 Wash. Law Reporter, 98.—REPORTERS.

is an action of debt. I think it is, at least, doubtful whether any proceeding upon a foreign judgment, in another jurisdiction, has any effect at all in staying the operation of our statute of limitations, because the action of debt upon that judgment here accrues at the moment it is rendered; but still it is not necessary to decide that question in this case. Here the judgment was rendered in September, 1869, and the original *feri facias* was returned in January, 1870. Taking the view most favorable to the plaintiff, and computing the twelve years from the date of the last proceeding, January, 1870, then in 1882, action upon that judgment would be barred by the statute of limitations here. That must be plain, unless there is something in the contention of the defendant that the subsequent execution issued in 1887, seventeen years after the return of the original *feri facias*, had some effect in the way of reviving the judgment.

He invokes the constitutional provision, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof; and also the subsequent enactment by Congress, to the effect that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States in the way designated, and the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken. (Act of May 26, 1790, 1st U. S. Statutes at Large, 122.)

The meaning of that is perfectly well settled by the decision of the Supreme Court of the United States in the case of *McElmoyle vs. Cohen*, *supra*. It means that judgments shall have such faith and credit given to them elsewhere as in the State where they are rendered, simply as evidence and as the final determination of the controversy between the par-

ties; that is to say, if the judgment is conclusive evidence as between the parties in the State where it is rendered, it is conclusive everywhere; and if *prima facie* only in the State where it is rendered, it is only *prima facie* elsewhere. It is not a judgment in another jurisdiction for any other purpose. It is not a lien upon property and no execution can be issued upon it until it is reduced to a new judgment by an action of debt. An execution issued on that judgment in the jurisdiction where it is rendered is not a judicial determination of anything, and it is not an act about which full faith and credit can be predicated. It has no effect except to create a lien upon the property of the defendant, and can have no effect in another jurisdiction. So that the language of the Constitution and the language of the act of Congress above referred to can have no application to a mere execution issued upon a judgment in another State, as giving it any validity or credit elsewhere. An execution in no sense revives the judgment. It is, after all, merely the act of the plaintiff himself, an *ex parte* proceeding, and can have no sort of effect in staying our statute of limitations.

In one case in Kansas, it was held that even a new judgment on a *fiat* rendered upon a *scire facias* would have no effect to revive a judgment against a non-resident, where there had been no personal service upon him. It is unnecessary for us, however, to go into that question. We simply say that on such a judgment an execution has no effect whatever and that the judgment, as we understand it, was barred as far back as 1882, by our statute of limitations. There was, therefore, error in rejecting the instruction prayed on behalf of the defendant in this record and directing a verdict to be rendered for the plaintiff.

The judgment is therefore set aside.

THE UNITED STATES

vs.

GLEN W. COOPER ET AL.

IN THE MATTER OF THE CONDEMNATION OF LAND FOR THE
ROCK CREEK PARK.

ROCK CREEK PARK ACT; DAMAGES; EXPERT WITNESSES.

1. Under the act of Congress of September 27, 1890 (26 Stat., 492), relating to the condemnation of land for the Rock Creek Park, and appropriating a sum of money to pay "the expenses of inquiry, survey, assessment, *cost of lands taken*, and all other necessary expenses incidental thereto"; such money cannot be applied to the payment of damages to a leasehold of land *not taken*, although included on the original plat of the projected park.
2. Where in such proceedings land included in the original plat was *not taken*, but finally excluded, payment will not be made to the owner of fees paid by him to his alleged expert witnesses, to prove the value of a white flint quarry on his land.
3. Such witnesses cannot be properly classed as expert witnesses. The subjects as to which they testified are not of a character involving especial skill or peculiar knowledge, but are within the range of ordinary experience.

District Court Docket. No. 366. Decided April 1, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an application for payment out of funds in court. *Denied.*

The facts are stated in the opinion.

Mr. BLAIR LEE for petitioner.

Mr. R. R. PERRY for the United States.

Mr. Justice HAGNER delivered the opinion of the Court:

An application has been presented to us in behalf of William H. Hayden for an order requiring the payment to him out of the funds in court of a sum of money upon the following grounds:

He alleges he was a tenant of Woodbury Blair and others of part of tract numbered 14 on the original plat of the projected park. When the Commissioners made their appraisements in December 1891, a valuation was returned by them for the entire tract, and the value of the unexpired term of the leasehold claimed by Hayden was stated at \$80, which was to be paid to him out of the gross sum. By the President's decision of April 14, 1892, tract 14 was excluded from the park and all claim by the United States against it was at an end.

Hayden now alleges the principal value of his lease consisted in the right to cut fencing stuff and firewood for himself and hands from the land; that by reason of an injunction by the equity court, passed in another cause, all cutting of wood from the lands laid down on the plat was forbidden, and consequently he was obliged to purchase firewood elsewhere at considerable expense, to carry on his business as dairyman: that the sum allowed him by the Commissioners was insufficient, and he has expended more than that sum in supplying himself with firewood. And claiming his said term was thus taken for a public use, he prays an order may be passed directing the payment of the said \$80.

An examination of the injunction cause referred to shows the restraining order was limited to one parcel of land in the whole park, that belonging to one of the Shoemakers, and from its operation all the other parcels were particularly exempted. That order therefore constituted no obstacle whatever to Mr. Hayden's continuing to take wood from the leased premises.

But apart from this, the tract No. 14, of which this property was a part, was never taken for public use. By the terms of the act of Congress, a sum of money was appropriated to pay "the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto—"; and this court has passed orders for the payment of moneys for these purposes. But the claim here is for the payment of property *not* "taken," but which has

distinctly been excluded from the park by the order of the President; and we are of the opinion we have no right to direct the application of the public money for the object claimed. If the action of the United States in the course of the inquiry as to the propriety of including certain lands within the park, has really caused direct injury to such lands, the owner may prefer his claim to the proper authorities; or perhaps to the Court of Claims; but we have no jurisdiction to give equitable relief in the manner claimed.

Samuel P. Lee, the owner of tract No. 15, which was within the lines of the original plat, has also applied for an allowance out of the fund in court to repay \$65 paid by him to witnesses examined in his behalf, before the Commission, to prove the value of a white flint quarry on his land. He claimed this stone was very suitable for road making, and the witnesses were called as experts to testify to its value and extent. In this case, also, the tract was excluded from the park, as finally established, and the quarry and all its surroundings remain with the proprietor unaffected by the condemnation.

We cannot suppose those witnesses can be properly classed with the description of witnesses known as experts. The subjects as to which they testified are not of the character involving especial skill or peculiar knowledge, but would appear to be entirely within the range of ordinary experience.

But apart from this, the circumstance that the land was not taken for public use, constitutes an insuperable objection to the passing by us of the order applied for.

When these applications were first made, we decided they could not be allowed; but agreed to hear counsel again on the subject. Our former opinion remains unchanged, and the prayer of each petition is refused.

AUGUST FREE
vs.
THE DISTRICT OF COLUMBIA.

NEGLIGENCE ; NOTICE

If a defect, harmless in itself, exists in a public sidewalk, long enough to be known to the municipal authorities, which defect only becomes dangerous in combination with snow and ice, of which the authorities had no notice at all, the municipality is not liable simply because it had notice of the pre-existing defect in the sidewalk.

At Law. No. 29,392. Decided April 1, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an appeal by the defendant from an order overruling a motion for a new trial. *Reversed.*

The facts are stated in the opinion.

Mr. H. E. DAVIS for the defendant (appellant).

Messrs. J. COLEMAN and O. B. HALLAM for the plaintiff (appellee).

Mr. Justice Cox delivered the opinion of the Court:

This was an action brought to recover damages for an injury alleged to have been suffered by the plaintiff from slipping on an iron vault cover on the sidewalk. The evidence in the case falls far short of the averments in the declaration. It is not necessary to make any reference to the declaration other than to say that it contains the usual allegations made in cases of this description, in reference to the dangerous condition of the street, the knowledge of that fact being brought home to the authorities of the District of Columbia, the exercise of due care on the part of the plaintiff, and the accident to him, notwithstanding. There was a verdict for the plaintiff, and a motion for a new trial was made on the usual grounds.

It appears from the evidence that on the east side of Eleventh street, above L, in the city of Washington, there was a vault with an iron cover to it, about 3 feet by 4 in dimensions, with little projections on top to avoid its being slippery and dangerous. The plaintiff resided at the corner above, and was in the habit of passing that point daily, and was very well acquainted, therefore, with the existence and location of this trap or cover. There was a space of some 8 or 10 feet between the iron cover and the curb, and it appears that about 3 inches had been chipped off from one of the south corners of this iron door, and that perhaps the bricks were depressed in immediate contact with that part of the door, but it does not appear from the testimony that the place was dangerous *per se*. On the 26th of November, 1888, the plaintiff went to his home as usual, from his place of business, he being a messenger in the Internal Revenue Department. On that morning there had been a snow storm, and at about half-past five in the afternoon he left his home to come down the street, and then this door was covered with sleet and snow, and he stepped upon the door and slipped off the corner that was broken, and fell, and, as he testified, sustained a dislocation of the shoulder and a fracture of the arm. It does not appear that there was any defect other than I have mentioned in the door itself or the sidewalk, and no witness testifies that in that condition alone it was dangerous. The testimony simply goes to show that when it was coated with ice or snow, as on this occasion, it did become dangerous. It does not appear, however, that any notice had been brought home to the District authorities of its condition at that time. Under these circumstances the following instruction was given at the instance of the plaintiff:

"2. If the jury find from the evidence that the plaintiff, while walking along the sidewalk on Eleventh street, near the corner of L street, without fault or negligence on his part, and while in the exercise of due care, stepped upon the iron door or cover referred to in the testimony, and slipped

and fell, and was injured thereby, and that the sidewalk in question where plaintiff slipped and fell, and said iron door or frame was out of repair, and was also coated with ice and snow; and that such defective condition, *together with the fact of its being covered with ice and snow*, rendered it unsafe for the passage of persons over the same, and *that by reason of said defective condition, together with its being covered with ice and snow*, the plaintiff fell thereon and was thereby injured, then he is entitled to recover in this action. Provided, *that such defect in said sidewalk, and in said iron door and iron frame, had existed for a sufficient length of time to charge the defendant with notice of its existence*, that is for a sufficient length of time so that the defendant in the exercise of reasonable care in the supervision of its streets ought to have known of the defect and remedied it."

In other words, the instruction was that if the defect existed, which defect was itself harmless, long enough to be known to the District authorities, and it only became dangerous in combination with snow and ice, of which the authorities of the District had no notice at all, the District was liable simply because it had notice of the pre-existing defect in the sidewalk.

It is attempted to assimilate this to the case of *Corts vs. The District of Columbia*, 18 D. C., 277. In that case it appeared that on the south side of Pennsylvania Avenue, between Fourteenth and Fifteenth streets, there was a defect which was not only dangerous, but which itself suggested that it would become exceedingly dangerous if it ever became coated with ice and snow. This court held in that case that that condition of the sidewalk in combination with a snow storm was notice to the authorities of the District of Columbia that the defect was dangerous. But that was going very far. In that case, however, it was the permanent condition of the street which was known to the District authorities that of itself suggested the idea that it would be dangerous if it ever became coated with ice or snow. That element

is wanting entirely in this instruction. This instruction virtually says that, although the defect itself did not even suggest to anybody that it would ever become dangerous, yet if in point of fact it became dangerous, the District of Columbia was liable. It seems very plain to us that that is error. That element, however, is added in the following instruction:

"3. If the jury find from the evidence that the defect in the pavement and in the said iron door or iron frame referred to was dangerous at the time referred to, when covered with ice and snow, *and the defendant had notice that it would become dangerous when so covered*, the occurrence of a snow storm was notice to the defendant that the pavement at that point was in a dangerous condition."

That undertakes to introduce the element that the condition of the sidewalk, although harmless at the time, yet would suggest the idea that it would become harmful and dangerous in the contingency of a snow storm.

We have to observe about that, in the first place, that there is no evidence in the case to justify that. Not a single witness testifies that the condition of the sidewalk ever would have suggested to anybody that it would become dangerous under any circumstances. We do not find that the small defect testified to would justify a jury or a court in inferring that it would become so dangerous and that the District ought to know it.

But, even if there was such evidence, in the next place, that does not relieve the error of former instruction. Taking the two instructions together they would amount to saying to the jury that, if you find that there was this defect in the pavement, although it was harmless, yet if it afterwards became dangerous by a combination with ice or snow, then the District would be liable whether it had reason to suppose, from the existence of the defect, it would become dangerous, or not.

There are two distinct propositions in these two prayers, and the one does not correct the error of the other. *We*

think this is sufficient ground to order a new trial. Therefore a new trial is ordered.

There were several instructions asked on the part of the defendant which it seems to us ought to have been given, but it is not necessary to consume time in discussing them.

JOHN H. BUSCHER

vs.

WILLIAM A. MURRAY AND RAPHAEL C.
GWYNN.

PROMISSORY NOTES; ACCOMMODATION ENDORSER; EQUITY
JURISDICTION.

1. Where a promissory note is endorsed by the payee, and is subsequently endorsed by a second endorser who has no interest in the matter, and the payee takes up the note at maturity, he cannot maintain a suit against the second endorser for contribution, unless there was an express agreement between them that they were to be co-sureties.
2. A surety has a complete remedy at law where he desires to recover a contribution from his co-surety, and equity, therefore, cannot take jurisdiction.

Equity. No. 12,457. Decided April 1, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing on an appeal by the defendants from a decree of a special equity term. *Reversed.*

The facts are stated in the opinion.

Mr. T. M. FIELDS for defendants (appellants).

Messrs. BIRNEY and BIRNEY for complainant (appellee).

The CHIEF JUSTICE delivered the opinion of the Court:

This cause was appealed from the special term of the equity court.

The bill avers that on the 19th of July, 1888, the com-

plainant and the defendant Gwynn, for the accommodation only of the said defendant Murray, endorsed for his benefit a promissory note drawn by Murray to the order of complainant, the same being for \$300, payable at three months after date, with interest, payable at the Central National Bank; and upon said endorsements said Murray procured said note to be discounted and received to his own use all the proceeds thereof; that the note was paid with a second note drawn and endorsed in the same way, the interest being paid by complainant, and upon the maturity of this second note it was taken up with another similar renewal note for a like amount, the complainant again paying the accrued interest; that the last of these notes matured February 2, 1890, and was protested, due notice being given the endorser, and the complainant, being required by the bank to do so, paid the note with interest and costs, amounting in all to \$306.60, his total payments on all the notes being \$329.85; that Murray has refused and neglected to pay complainant, and Gwynn has refused to pay half the loss; that Murray is insolvent and financially irresponsible; that complainant is advised that Murray is lawfully bound to reimburse him in said payments, but because of Murray's inability, the complainant is entitled to have contribution from the defendant, Gwynn, who was his co-surety in the premises.

The bill prays for the recovery of the whole amount from Murray, and from Gwynn, one-half of the entire amount which the complainant claims he has paid by reason of his endorsement of the note.

A demurrer to the bill was filed, which was overruled.

Thereupon, the defendant, Gwynn, in his answer says:

That about the 19th of July, 1888, defendant Murray had in the bank of William Mayse & Co. his note for \$500, endorsed by complainant, Buscher, for his accommodation. This note was due or about to become due, and Murray wished to take it up, or to renew it, and Buscher also desired this. Murray had also out two notes of \$50 each, endorsed by Buscher, which were about to mature, and

Buscher was anxious that they should be taken up. Gwynn was not a party to any of these notes. In order that these notes might be taken up it became necessary to get money in some other way than from Murray, he being then embarrassed. Thereupon, Buscher, solely for his own benefit and to relieve himself as far as possible as the endorser of said notes, offered the said Murray to get a note with a good second endorser discounted at the Central National Bank. Accordingly, Murray brought to Gwynn a note drawn by him to the order of Buscher and with the endorsement of Buscher thereon, and requested his endorsement, advising Gwynn of the purpose to which the proceeds were to be applied. Knowing Buscher to be financially responsible, Gwynn endorsed the note. He denies that he endorsed for the accommodation of Murray, and says he did it for the accommodation and benefit of Buscher only, and that he never made himself liable in any other manner than as an endorser subsequent to Buscher, who was the payee, and who always knew that the respondent was not under any circumstances to be liable to him.

The answer further declares that after the note was endorsed, Buscher took the note to the Central National Bank, where he was a depositor, and had it discounted and placed to his credit. The respondent, Gwynn, was also a depositor there. After the discount Buscher, as the respondent believes, withheld the proceeds for several days and applied the same to his own use. In a few days he gave the proceeds to Murray, who used the same to take up and renew the notes aforesaid. He further says that Buscher was the active party in the procuring of said note sued upon in order to relieve himself; and that the renewals were made for the same purpose, and therefore for Buscher's benefit, and it was right that he should pay the interest and costs; that the renewal note preceding that now in suit was brought to respondent by Buscher, who requested respondent to endorse it; just before that note became due Buscher again requested respondent to endorse for him; which he did, leav-

ing a blank for Murray's signature, Buscher being payee; that Buscher procured Murray's signature, placed his own endorsement under that of the respondent's, and took it to the bank, where it was used to renew the loan.

He denies that he was ever co-surety with Buscher for Murray, or that he is liable in law to pay any part of the loss.

The question as to the liability of accommodation endorsers, where the payee of the note is one endorser and the note is subsequently endorsed by a party who is a stranger to the face of the note, is one that has been very much mooted, and in relation to which the decisions in the various States are not exactly in accord. But for this jurisdiction the question was conclusively settled as early as the case of *McDonald vs. Magruder*, in 3 Peters, 470. The opinion in that case, by Chief Justice Marshall, held that where a note made for the accommodation of the maker was endorsed by the payee as a matter of accommodation and was also subsequently endorsed by a stranger, the payee and the stranger who thus endorsed the note sustained the relation of first and second endorser, and were not to be regarded as joint co-sureties as a matter of law. In the same case it was said that if there were any agreement between the parties, although it did not appear upon the instrument itself, it might be the subject of an action, and would control the rights and liabilities of the parties as between themselves; that under such circumstances it might be that parties by agreement could make themselves co-sureties. The right of contribution in such a case would, of course, obtain.

This is admitted by counsel for complainant to be the law, but it is further claimed by him that in this case the testimony shows that there was an agreement between the parties that they were to be jointly liable and were to sustain the relation of joint co-sureties.

We have examined the testimony with care. It is well enough to premise that, if it is intended to rely on a contract by implication it must be made apparent that both

parties understood the contract to be as claimed; that it is not sufficient, in other words, to prove by Mr. Buscher, who was the payee and first endorser of this note, that he understood Gwynn was jointly liable with him by reason of his endorsement. It must be shown either that there was an express agreement to the effect that Gwynn should be a co-surety, or such facts and circumstances must be shown as are sufficient to satisfy the court that both these parties at the time understood that to be the case. We do not think there is any sufficient evidence to show that Gwynn had any expectation or thought of becoming a joint co-surety with Buscher, or that he had any thought or expectation of occupying any other relation than that of second endorser. We think he endorsed upon the credit of Buscher as well as of Murray, the maker of the note. He testifies that he knew at the time that Murray was not responsible and was much embarrassed, and that he would not have endorsed the note for him alone. This being true, the complainant has failed to make out a case entitling him to recover of Gwynn as a co-surety.

Even if this were not so, we think it is well established by the authorities, that a surety has a complete remedy at law where he desires to recover a contribution from his co-surety. The only instance in which he would be obliged to resort to a court of equity would be where there are a number of sureties jointly liable and some one or more of them insolvent. Then, inasmuch as the action at law is for an aliquot part of the entire consideration which each of the co-sureties is to pay, it becomes impossible that the party who has paid the debt can receive full indemnity by suing the solvent co-sureties at law. In such a case the surety who has paid a note may bring his action in equity. But there is nothing of that kind in this case. It is true Murray is insolvent, but he is not a co-surety. There are only two sureties, and both are admitted to be solvent. Therefore, plainly, under the authorities, the complainant in this case, Buscher, might have brought his action at law upon an

agreement such as he claims in argument to be established by the evidence. It follows that a court of equity has no jurisdiction of the present action.

The court, in special term, dismissed the bill so far as Gwynn was concerned, but entertained the bill for the purpose of granting a decree for the full amount of the debt in favor of Buscher against Murray. If we have no jurisdiction as a court of equity, that decree cannot be sustained.

Our conclusion is that the decree below should be reversed and the bill dismissed for want of jurisdiction. It is so ordered.

WILLIAM H. ROBERTSON

vs.

THOMAS B. STAHL.

TAXATION OF COSTS; ATTORNEYS' FEES.

1. The General Term will not entertain upon *ex parte* affidavits, a motion to re-tax costs, when the question involved is as to the number of days during which witnesses attended court.
2. Sections 823 and 824 of the R. S. U. S. apply to the courts of this District, and provide for a docket fee of twenty dollars to the successful attorney, after a jury trial. Section 903 R. S. D. C. is no longer applicable to such cases.

At Law. No. 28,542. Decided April 1, 1893.

The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Hearing in the General Term in the first instance in an action at law on a motion by the defendant to re-tax costs. *Remanded.*

The facts are stated in the opinion.

Messrs. CARUSI and MILLER for the plaintiff.

Mr. J. J. WATERS for defendant.

Mr. Justice HAGNER delivered the opinion of the Court:

The controversy in this case involves the correctness of the taxation of costs in an action of replevin brought by the

plaintiff against the defendant, who as a constable had seized a small quantity of butcher's meat belonging to the plaintiff, under a writ of *fieri facias*. The property was delivered to the constable under the levy, and remained in his possession for one night only, and the next day was returned to the plaintiff under the writ of replevin. On the trial of the replevin case in the special term, the verdict was in favor of the plaintiff, "with one cent damages and \$—— for his costs of suit." On appeal the rulings below were affirmed by the General Term, with costs to the plaintiff below. The case being remanded to the special term, the clerk, on application of the plaintiff taxed the costs, allowing among others, the plaintiff's attorney \$20, and the plaintiff's witnesses \$58.75; the entire sum amounting to \$104.48. One of the plaintiff's witnesses, J. R. Robertson, was allowed for fifteen days' attendance; and another, James L. Robertson, was allowed for twenty-nine days' attendance, in this taxation. A few days afterwards the defendant moved to strike out this taxation and re-tax the costs. In support of this motion various grounds were set forth, some of them involving questions of fact; for instance, it alleged that the allowances to J. R. Robertson and J. L. Robertson were fraudulent and unfounded; and that none of the witnesses' charges for attendance were legally proved.

In support of the defendant's motion an *ex parte* affidavit was filed, in which the affiant, who was the defendant's attorney in the case, declared the two witnesses named were not in attendance as witnesses for the number of days allowed to them respectively, but were only in attendance one or two days.

The other reasons alleged in support of the motion involved matters of law.

The Justice holding the special term declined to decide the motion, and certified it to be heard here in the first instance. It is evidently impossible for this court to decide the motion as now presented, inasmuch as there is no evidence before us upon the questions of fact involved, the *ex*

parte affidavit not affording a just ground for such a decision. The certificate to this court was therefore premature, and should have been deferred until testimony had been presented by both sides as to the disputed facts: and for this reason alone, the case must be remanded.

But the case has been very fully argued as to the legal aspects of the motion, and upon one of those questions we will state our understanding of the decisions in this court, which may be a guide to the court below when it shall have the motion before it in proper form.

It is argued that the plaintiff's attorney's fee was improperly taxed at \$20, under the general law of the United States, Secs. 823 and 824, Revised Statutes U. S., and that the proper method of taxing that fee under the law in force in the District, is that pointed out in section 903 of the Revised Statutes, Dist. Col., which declares:

"In suits at common law in the Supreme Court, the taxable fee to an attorney shall be five dollars only; and in suits in chancery, the taxable fee to a solicitor shall be ten dollars only."

This embodies a statute passed March 3, 1807, which related only to the old Circuit Court, the only court named therein. The provisions found in sections 823 and 824 of the Revised Statutes of the United States, embody the act of February 26, 1853, which also had its origin before the creation of the Supreme Court of the District. Some pains were taken in that statute to point out the different courts and the classes of cases therein, in which attorneys' fees should be taxed; fixing different sums according to the importance of the service rendered.

Section 823 provides:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States; to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law."

By section 824 it is provided that:

"On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; provided that in cases of admiralty and maritime jurisdiction, when the libellant recovers less than \$50, the docket fee of his proctor shall be but ten dollars.

"In cases at law, when the cause is discontinued, five dollars.

"For scire facias and other proceedings on recognizances, five dollars."

It thus appears the new statute applied to several descriptions of suits omitted from the act of 1807, as criminal and admiralty cases, and suits generally in the district court of the United States; and it displays a systematic purpose to establish a scale of charges, proportioned to services rendered; differing in that respect from the act of 1807, which allowed the same attorney's fee whether the judgment was rendered without a jury or was discontinued as in cases where there had been a prolonged trial before a jury. Within the general principles laid down in *Page vs. Burnstine*, 102 U. S., 664, this statute would apply to the courts of this District, there being "nothing locally inapplicable" to exclude it. This particular point has several times been before our courts, and, without exception, so far as we can learn, the decision has been, that, in a case like this, where there was a final trial and verdict before a jury, the attorney's fee should be taxed at twenty dollars.

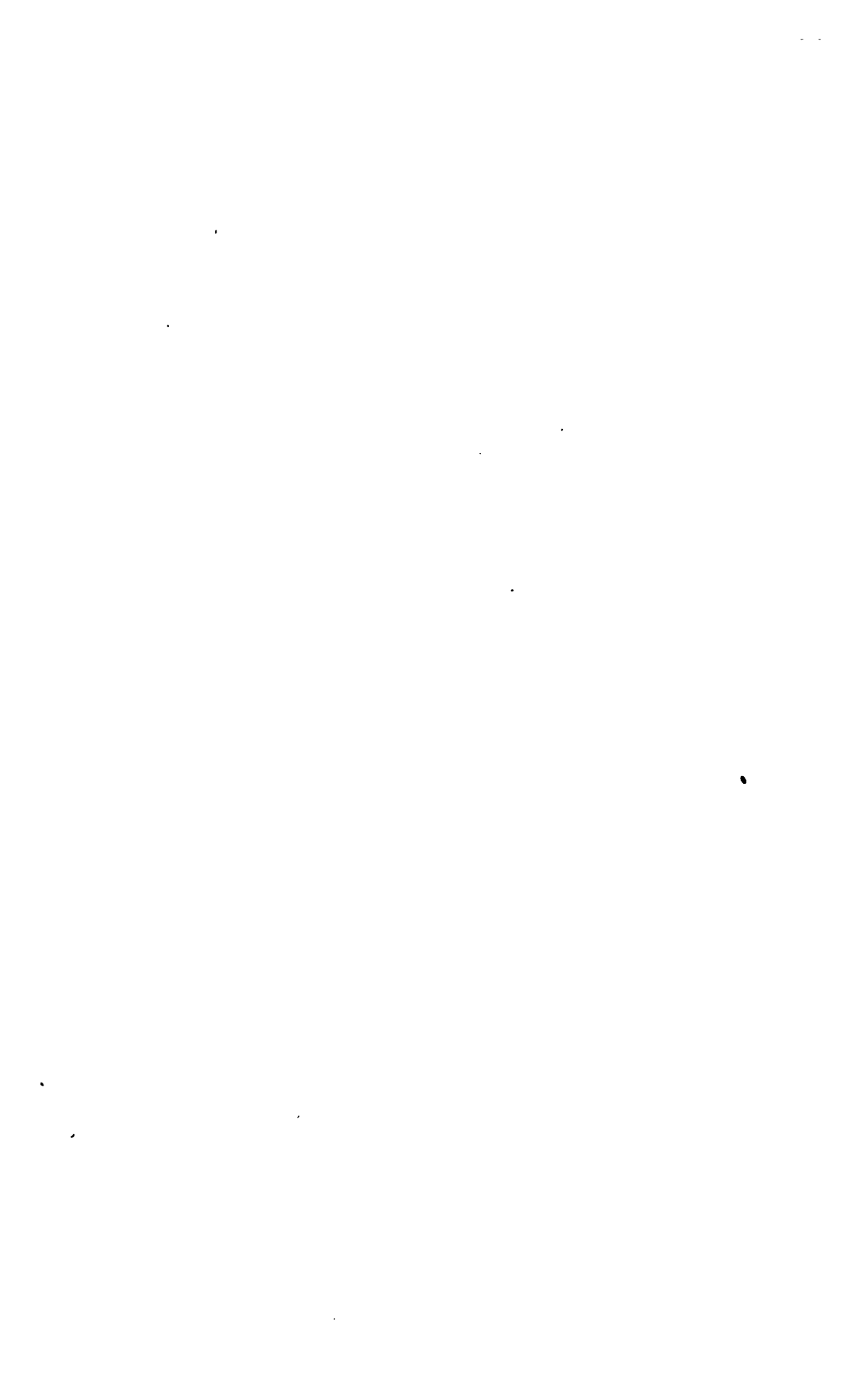
In our examination we have ascertained that in June, 1882, in the Equity Court, Mr. Justice Cox delivering the opinion, in the case of *Torbert vs. Torbert*, in No. 7891, equity, the allowance of twenty dollars was made for solicitor's fee, upon the express ground that the act of 1853 governed the subject in this jurisdiction.

In *Torbert vs. Torbert*, No. 7891, equity, Justice Hagner made a similar decision, which was affirmed by three justices holding the General Term; and in *Ruppert vs. Smith*, equity

No. 8891, Mr. Justice James delivered an opinion to the same general effect.

It is not important for us to consider the other points at this time. We have said this much in the interest of the members of the bar.

This case would have been decided sooner, but we were informed at the hearing, that another case had gone to the Supreme Court of the United States, in which the identical question, here presented, was raised; and we thought it advisable to withhold our decision until that case should be decided. But as we have not been able to ascertain, with certainty, after calling attention to it again and again, that this statement was correct, *we now remand the case to the Special Term with instructions to allow this taxation to be re-opened, and to take such proceedings therein as may be proper.*



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ACTIONS. See ADMINISTRATION, 5, 6, 7; INTEREST, 1, 2, 3; JUDGMENTS, 1, 2, 3; PAYMENT, 2; PROMISSORY NOTES, 1.

ACTUAL NOTICE. See NOTICE.

ADMINISTRATION. See PLEADING AND PRACTICE, 3.

1. An occupation of land by one heir pending the settlement of his ancestor's estate, without any agreement to pay rent, and not to the exclusion or against the will or objection of his co-heirs, is a permissive occupancy, and he is not chargeable upon a settlement for such use and occupation. *Bohrer v. Otterback*, 32.
2. Under a bill filed to obtain the construction of a will, a decree which amounts to a personal judgment against one of the defendants for use and occupation of a portion of the estate, is erroneous as beyond the jurisdiction of the court. Such a demand should be pursued at law. *Id.*
3. An administrator is entitled to commissions upon any moneys which come properly into his hands, even though it afterwards appears that such moneys do not belong to the estate. *Id.*
4. If a legatee permits his legacy to remain in the *corpus* of the estate for many years after it is payable, he is not entitled to interest thereon. *Id.*
5. The personal representative of a person whose death was caused by the negligence of another in a foreign jurisdiction, by the laws of which jurisdiction an action therefor is maintainable, may sue in the District of Columbia. *Weaver v. Railroad Co.*, 499.
6. Under the act of Congress of Feb. 28, 1887 (24 Stat. 431), a foreign administratrix may maintain such an action in this District as if she had been appointed here. *Id.*

7. An administratrix taking out her letters in Maryland, but suing and recovering damages in this District by virtue of a statute of West Virginia, must make distribution according to the laws of West Virginia. *Id.*
8. The act of Congress of Feb. 17, 1885 (23 Stat. 307), only applies to deaths caused in the District of Columbia, and the limitation of one year therein does not affect a suit brought for a death outside of the District by virtue of the statute of another jurisdiction, and in the absence of a statute to the contrary in this District, the limitation provided for in the statute under which the suit is brought, governs. *Id.*

ADMINISTRATOR. See ADMINISTRATION, 3, 4, 5, 6, 7; PLEADING AND PRACTICE, 3.

AFFIDAVITS. See PLEADING AND PRACTICE, 27.

AFFIDAVITS OF DEFENCE. See SEVENTY-THIRD RULE.

AGENTS. See PRINCIPAL AND AGENT.

ANSWER. See EQUITY PLEADING AND PRACTICE.

APPEALABLE ORDERS. See APPEALS.

APPEALS. See PLEADING AND PRACTICE, 1, 2, 5, 6, 14, 23.

1. An appeal lies from a judgment of the circuit court upon an auditor's report filed pursuant to an order of reference. *Moses v. Fitts*, 98.
2. When a party appeals from the Orphans' Court, but fails to prosecute his appeal, the General Term will not entertain a motion to docket the case and dismiss it for want of prosecution. *In re Clark's Estate*, 99.
3. Under such circumstances the appellee should apply to the Orphans' Court to proceed to the settlement of the estate. *Id.*
4. An appeal will not lie to this court, from any ruling of the Commissioner of Patents, on the admissibility of amendments to specifications. *Chinnock's Appeal*, 594.
5. The court will review the decision of the Commissioner on claims as they are presented to him for final decision, either in the shape in which they were originally made, or as amended with the leave of the Patent Office. *Id.*

APPEALS, MOTIONS TO DISMISS. See PLEADING AND PRACTICE, 1.

APPELLATE PRACTICE. See PLEADING AND PRACTICE, 1.

APPRAISERS. See CONDEMNATION OF LAND.

ASSAULT. See RAILROADS, 3.

ASSIGNMENT IN BANKRUPTCY. See JUDGMENTS, ASSIGNMENT OF.

ASSIGNMENT OF JUDGMENTS. See JUDGMENTS, ASSIGNMENT OF.

ASSIGNMENT OF SALARY. See PAYMENT.

ASSIGNMENTS.

1. An assignment preferring certain creditors, made with the intent on the part of the assignor to defraud other creditors is void, notwithstanding the preferred creditors are not participants in that fraud. *Fechheimer v. Hollander*, 76.
2. The statute of 13 Eliz. Ch. 5, relating to fraudulent conveyances, is in force in the District of Columbia, in its original form by transmission from Maryland. *Id.*
3. An assignee in an assignment for the benefit of creditors is not a *bona fide* purchaser for a valuable consideration, within the meaning of 13 Eliz. Ch. 5. *Id.*
4. A fraudulent purchase and subsequent assignment may be so connected by the purchaser and assignor as to constitute one transaction, and thus make the assignment a fraud intended from the beginning to affect the defrauded vendor. *Id.*

ASSISTANT COMMISSIONER OF PATENTS. See COMMISSIONER OF PATENTS, 1; FRAUDULENT CONVEYANCES, 1.

ATTACHMENT. See JURISDICTION.

ATTORNEY AND CLIENT.

1. An attorney who collects money for his client, and is not guilty of laches or default in regard to paying it over, is not liable for interest. He is only liable for interest in the event that he should fail to pay the money when demanded, or should appropriate it in some way to his own use. *Dale v. Richards*, 312.
2. Under Section 810, R. S. D. C., an attorney may set off his fees for services, where suit is brought against him for money collected. *Id.*
3. An agreement with an attorney to prosecute on a contingent fee an action on a promissory note is not unlawful. *Id.*

ATTORNEY'S FEE. See PLEADING AND PRACTICE, 28.

AUDITOR.

1. Exceptions to an auditor's report should not leave the court in doubt as to whether the ground of complaint is an absence of

evidence, or a preponderance against the auditor's conclusion, or whether the testimony relied on was inadmissible in law. Such exceptions will not be considered. *Haller v. Clark*, 128.

2. The findings and conclusions of the auditor upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, his report will be allowed to stand. *Id. York v. Tyler*, 265.
3. The apportionment of the auditor's fee and the amount is within the discretion of the special term. *Id.*
4. Mere general exceptions to the findings of the auditor, without specifically stating the grounds therefor, and setting forth the very evil complained of, are insufficient, and will not be regarded by this court on appeal. *York v. Tyler*, 265.
5. The auditor of this court sustains a relation to it similar to that which a master in chancery ordinarily has to a court of equity, and the same consideration should be given to his report and exceptions as should be given to reports made by masters in chancery. *Id.*

AUDITOR'S REPORT. See **APPEALS**.

BADGE OF FRAUD. See **FRAUDULENT CONVEYANCES**.

BANKRUPTCY. See **JUDGMENTS, ASSIGNMENT OF**.

BAR. See **UNLICENSED BAR**.

BILL OF EXCEPTIONS. See **PLEADING AND PRACTICE**, 5, 6, 7, 9, 17, 20, 21, 23.

BILLS AND NOTES. See **PROMISSORY NOTES**.

BOILERS, EXPLOSION OF. See **EVIDENCE**, 4; **UNLICENSED ENGINEER**.

BOILER INSPECTOR, REPORT OF AS EVIDENCE. See **EVIDENCE**, 4.

BONA FIDE PURCHASER. See **PURCHASER**.

BONDS.

1. When one person gives another a bond to save him harmless from all costs and damages to be sustained by reason of his becoming surety on another bond, and such other person is obliged to pay counsel fees in defending an action against him on the latter bond, such counsel fees are recoverable in an action on the former bond. *McKenzie v. Underwood*, 126.

2. The condition of an official bond was : " If the said D shall, and doth at all times, henceforth, and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public moneys, and honestly account without fraud or delay for the same, and for all public property which shall or may come into his hands, then the above obligation to be void ; otherwise to remain in full force and virtue." *Held*, that the sureties on such bond were liable for a balance of public moneys coming into their principal's hands during a former term of office, and for which he had failed to account, in the absence of proof that a defalcation by the officer had occurred during the former term. *United States v. Dudley*, 337.

BUILDING REGULATIONS.

Congress having authorized the Commissioners to make building regulations, which should have the force of law, such regulations when made, even though differing from those promulgated by President Washington, are valid. *Halpine v. Barr*, 331.

CASE STATED. See PLEADING AND PRACTICE, 23.

CAVEAT. See WILLS, 2.

CAVEAT EMPTOR. See CONTRACTS, 4.

CHALLENGES. See CRIMINAL LAW, 3.

CHARACTER. See CRIMINAL LAW, 26.

CHARGE TO JURY. See CRIMINAL LAW, 17 ; PLEADING AND PRACTICE, 19, 21.

CHECK. See TENDER.

CLOUD ON TITLE.

1. In tracing titles, identity of names is *prima facie* identity of title, therefore, where in a suit in equity to remove a cloud from title, the complainants show a *prima facie* title resulting from identity of name, they must succeed, unless the defendants show that another person of the same name resided in the District at the time in question, who might have been the owner of the property. *Scott v. Hyde*, 531.
2. In such a suit, the record of a tax deed of 1840 adverse to the complainants' title, does not even constitute a cloud thereupon, because the statute at that time did not make the tax deed even *prima facie* evidence of title. *Id.*

COLLATERAL PROCEEDINGS. See USURY.

COMMISSIONER OF GENERAL LAND OFFICE. See DEPARTMENTAL DECISIONS, 2 ; MANDAMUS, 3.

COMMISSIONER OF PATENTS. See APPEALS, 4, 5.

1. The decision of an Assistant Commissioner of Patents is of the same dignity and authority as that of a Commissioner. *In re Hoeveler and McTighe*, 107.
2. When a Commissioner of Patents has once passed upon the merits of an application, the same matter cannot be again enquired into by a subsequent Commissioner, notwithstanding the former Commissioner may have directed that the case be called to his personal attention before the patent shall issue. *Id.*

COMMISSIONER OF PATENTS, APPEALS FROM. See APPEALS, 4, 5.

COMMISSIONS. See ADMINISTRATION, 3; POSTMASTERS' SALARIES.

COMMON CARRIERS. See RAILROADS.

CONDEMNATION OF LAND. See ROCK CREEK PARK.

The court in General Term will not ordinarily give instructions in advance, as to how appraisers shall perform their duty in making valuations of land under condemnation proceedings. *Railroad Co. v. Hennessy*, 489.

CONFLICT OF LAWS. See ADMINISTRATION, 8.

CONNECTING LINES. See RAILROADS, 1, 2, 3.

CONSIDERATION. See CONTRACTS, 6; FRAUDULENT CONVEYANCES, 2, 3, 4; GAMING CONTRACTS, 2; HUSBAND AND WIFE, 1, 2; PROMISSORY NOTES, 4, 5.

1. When a party holding securities for an indebtedness due him, is induced to surrender such securities on the promise by the debtor to execute and deliver in lieu thereof a deed of trust on real estate, such promise forms a sufficient consideration for the subsequent execution of the deed of trust, as against other creditors of the debtor. *Petingale v. Barker*, 156.
2. When the payee of a promissory note, the consideration for which was the sale of an alleged invention, sues the maker thereon, and the affidavit of defence discloses the fact that the Patent Office had decided the alleged invention not to be patentable, the consideration fails, and judgment under the seventy-third rule will be refused. *Hodge v. Mason*, 181.

CONSTITUTIONAL LAW. See JUDGMENTS, 6.

CONSTRUCTIVE NOTICE. See NOTICE.

CONTINGENT FEES. See ATTORNEY AND CLIENT, 3.

CONTRACTS. See ATTORNEY AND CLIENT; CONSIDERATION; GAMING CONTRACTS; HUSBAND AND WIFE; MECHANICS' LIENS, 1, 2, 4; PRINCIPAL AND SURETY, 1; RAILROADS, 1, 2, 3; TENDER.

1. Where statements designedly false have been made by one party to a contract to another who has accepted and acted upon them as true, to his injury, relief will be afforded in a court of equity, against its enforcement, upon the ground of fraud; and rescission will be decreed. *Battelle v. Cushing*, 59.
2. It is not necessary that fraud should have been deliberately practised by a party relying upon a contract, if it appears that there have been material misrepresentations in fact which were accepted by the party to whom they were made, as true, to his prejudice. *Id.*
3. A man may act upon a positive representation of fact, notwithstanding that certain means of knowledge are specially open to him (as *e. g.*, in the public registry), of the real state of things. If the representations are of a character to induce action, and do induce it, that is enough. *Id.*
4. The rule in private sales, of *caveat emptor*, applies only in the absence of fraud. The rule of law is, that both parties to a contract, whether of sale or not, must act the part of prudence; nothing more is required. In the absence of any misleading word or act by the opposite party, this rule requires each party to satisfy himself before the contract is made. *Id.*
5. A verbal contract for the sale of real estate is within the fourth paragraph of Section 4 of the Statute of Frauds, and is therefore void. *Kraak v. Fries*, 101.
6. A note given to secure the execution of a void agreement is equally void, as without consideration. *Id.*
7. A parol agreement collateral to a written contract concerning the sale of interests in lands, and not interfering with its terms, is not void under the Statute of Frauds. *Id.*
8. When a contract is made for the purchase of real estate by a day named, but not performed on that day, an offer to purchase on a subsequent day is not a sufficient compliance with the contract on the part of the contemplated vendee. *Id.*
9. As soon as one person has disabled himself from performing his contract with another, the latter's right of action accrues, and he need not wait to ascertain whether his rights may not ultimately be secured to him. *Payne v. Pomeroy*, 243.
10. When a contract is made with trustees to purchase property in

their name, and the property is subsequently purchased in the name of another party, a right of action at once accrues, and the fact that the trustees might at some future time re-purchase the property and perform their covenants, will not prevent a recovery. *Id.*

CONTRIBUTION. See PRINCIPAL AND SURETY.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVERSION. See ATTORNEY AND CLIENT, 1.

CORPORATIONS. See INCORPORATION.

COSTS, TAXATION OF. See PLEADING AND PRACTICE, 27, 28.

COUNSEL FEES. See BONDS.

COUNSEL, MOTION TO EMPLOY NEW. See PLEADING AND PRACTICE, 1.

COURT, QUESTIONS FOR. See NEGLIGENCE, 4.

CREDITORS. See CONSIDERATION; FRAUDULENT CONVEYANCES; TRUSTS, 4.

CREDITORS, ASSIGNMENTS FOR BENEFIT OF. See ASSIGNMENTS.

CRIMINAL INTENT. See INTENT.

CRIMINAL LAW. See INSANITY.

1. An indictment coming from the grand jury room bearing in its caption the words: "District of Columbia, County of Washington," contains a sufficient statement of the place of the commission of the crime charged in the indictment, when the only averment of the place is a reference to the venue laid in the caption. *United States v. Schneider*, 381.
2. The public interest requires prompt investigation and punishment of crime, and where the record in a capital case contains no showing of public clamor or other sufficient reason for delay, the refusal of the trial justice to postpone the trial is not error. *Id.*
3. If a juror in a criminal case is erroneously judged competent over the challenge of the defendant *for cause*, and the defendant is compelled to challenge him *peremptorily* in order to exclude him from the panel, and when the jury is completed and ready to be sworn, he has exhausted his peremptory challenges, the error is an injury to him, and is ground for the reversal of the judgment against him. *Id.*

4. In a criminal case, a juror will come within the requirement of impartiality, although he may have formed and expressed an opinion based upon rumor or newspaper accounts and although he may require evidence to change his opinion, if notwithstanding this, he can, in his own judgment, or in the judgment of the court based upon the whole examination, render an impartial verdict according to the law and the evidence, and the finding of the court upon that issue will not be set aside unless the error is manifest. *Id.*
5. An affidavit charging a juror in a murder case with having expressed an opinion which disqualified him from serving, is offset by an explicit denial by the juror under oath. *Id.*
6. The declarations of an injured party, as well as those of third persons, where such statements are the immediate concomitant and result of the principal fact, may be received in a murder case not only to show the nature of the injury, but also the cause. *Id.*
7. Dying declarations are admissible in evidence if it satisfactorily appears in any way that they were made under the sanction of impending death; whether that fact be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants stated to him, or from his conduct, or other circumstances of the case, all of which may be resorted to in order to ascertain the state of the declarant's mind. *Id.*
8. If a man is shown to have fired several shots into another person at close quarters, from which death results, the act is presumed to be intentional and malicious, even without any direct proof of motive, express malice or premeditation, and no inference that it was accidental could be justified by the mere conjecture that it might possibly have been accidental, or by the general presumption of innocence. *Id.*
9. If one person intentionally kills another without provocation from the latter, the fact that it was done under a sudden impulse of anger, or in resentment for a third party's interference between them, or in revenge at being fired at first by a third party, would make the crime none the less murder. *Id.*
10. In a capital case, evidence as to the opinions of witnesses as to the number of pistol shots fired is properly excluded, where the witnesses testify as to all the facts within their knowledge in reference to the shooting. *Id.*
11. Section 1033, R. S. U. S., does not preclude the government in a capital case from making use of any material testimony discov-

ered during the progress of a trial. All that the section exacts of a prosecuting officer is that he shall, in good faith, furnish to the prisoner before the trial, the names of all the witnesses then known to him and intended to be used at the trial. *Id.*

12. The order of proof in a capital case may be regulated by the trial justice, in his sound discretion, and it is not only his right, but his duty, where, in his judgment, justice requires it, to admit evidence at any stage of the case, though the party has no strict right to offer it. After the defendant's case is closed, the trial court may admit evidence in criminal cases which is strictly evidence in chief. *Id.*
13. A long, painful and laborious trial of a capital case will not be held abortive because one of a cloud of witnesses is shown to have said something calculated to wound the feelings of one or more jurymen, which might result in a possible or conjectural detriment to the cause of the defendant, of which no actual trace can be seen. *Id.*
14. It is never a collateral matter to show a personal interest of a witness in a suit, and where it is manifested in an effort to punish another witness for his testimony, it is especially relevant. *Id.*
15. Although the verdict to which each juror agrees, must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them, and with due regard and deference to the opinions of each other. *Id.*
16. It is not correct practice to single out isolated facts and ask instructions as to their legal effect, when a number of facts and a whole course of conduct are relied on, collectively, as showing a motive in a capital case. *Id.*
17. It is an invasion of the province of the jury to charge, that when a good or a bad motive for doing an act can be imputed to the person committing it, the law says the good motive must be imputed, if the same can be done from the evidence reasonably to the satisfaction of the jury. *Id.*
18. A judge of a United States Court, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts. When no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expression of opinion is not reviewable on a writ of error. *Id.*
19. A motion for a new trial in a capital case is properly overruled when it is based upon an affidavit setting up as newly discov-

- ered evidence, a conversation with affiant by a deceased witness, in which the witness stated what he had seen of the occurrence in question; the deceased witness having testified at a former trial, and on the second trial, defendant's counsel having been permitted to state the former testimony of deceased witness. *United States v. Barber*, 456.
20. A trial and conviction based upon an indictment subsequently held to be insufficient and void, are nullities and cannot be pleaded in bar of a second indictment for the same offence. *Id.*
21. A trial court may be entirely justified in accepting one of two jurors and rejecting the other, although their answers may appear from the record to have been identical; for the one may have exhibited in his deportment entire respectability and candor, while the other may have given evidence of insincerity and evil habits. *Id.*
22. If it appears from the whole examination of a juror that he could render an impartial verdict upon the evidence alone as submitted to the jury, such a state of mind on his part would render him a qualified juror, notwithstanding the alleged opinion he may have formed from reading the newspapers or listening to rumors. *Id.*
23. A person who is employed as a stamp agent by the Government to sell stamps on a small salary, is not "a salaried officer of the Government of the United States," and as such, exempt from service as a juror, under Section 875 of the Revised Statutes, relating to the District of Columbia. *Id.*
24. An indictment for receiving stolen goods under our statute must set out that the accused received the goods, knowing them to be stolen, with the intent to defraud the owner thereof, and this intent must be proved; but it is not essential that the prosecution should prove such intent by positive testimony. *United States v. Lowenstein*, 515.
25. In such a prosecution the trial court may properly instruct the jury, if they should find the accused knew the goods were stolen when he received them, the intent to defraud the owner could be gathered from the circumstances surrounding the case; that it followed as an inevitable presumption in the absence of any proof to the contrary, that he received them with the intent of defrauding the owner. *Id.*
26. It is proper for the trial court in such a case to explain to the jury the effect of revelations in the evidence subsequently adduced, tending to show his bad character, upon previous testimony as to the good reputation of the accused. *Id.*

CURTESY. See **PARTITION**, 2.

1. A husband need not necessarily have had some right in his wife's estate during her life, in order to have an estate by the curtesy after her death. The fact that he has no interest in her lands during coverture is not sufficient by itself to make curtesy impossible in case she dies intestate. *Smith v. Smith*, 289.
2. Since the passage of the Married Woman's Act (Secs. 727-730, R. S. D. C.), the husband continues to have his common law right as to curtesy, subject to be defeated by his wife's alienation of her property. If his right is not thus defeated, it simply remains undisturbed by her, and he takes his estate. *Id.*

DAMAGES. See **ADMINISTRATION**, 5, 8; **BONDS**; **EMPLOYER AND EMPLOYEE**; **NEGLIGENCE**; **RAILROADS**, 3; **ROCK CREEK PARK**; **STREETS AND HIGHWAYS**; **UNLICENSED ENGINEERS**.

DAMAGES, REDUCTION OF. See **PROMISSORY NOTES**, 3.

DEATH BY WRONGFUL ACT. See **ADMINISTRATION**, 5, 6, 7, 8.

DEBTOR AND CREDITOR. See **CONSIDERATION**.

DECEASED WITNESS, FORMER TESTIMONY OF. See **CRIMINAL LAW**, 19.

DECEDENTS' ESTATES. See **ADMINISTRATION**; **APPEALS**, 3; *Scire facias*, 1, 2.

DEEDS. See **DURESS**; **MORTGAGES**; **TAX DEEDS**.

DEEDS OF TRUST. See **CONSIDERATION**; **MORTGAGES**.

DEFALCATION. See **BONDS**, 2.

DEFEASANCE. See **MORTGAGES**.

DEMURRER. See **FRIVOLOUS DEMURRER**.

DEMURRER, ARGUMENT OF. See **PLEADING AND PRACTICE**, 3.

DEPARTMENTAL DECISIONS. See **COMMISSIONER OF PATENTS**.

1. It *seems* that where a matter is intrusted to the adjudication of the head of a department or an executive officer of the government, to be determined by him, his decision cannot be re-opened, set aside, and a different result ordered by his successor, except for fraud, clerical error apparent on the face of the proceedings, or newly discovered evidence presented within a reasonable time and under such circumstances as would be a sufficient cause for granting a new trial in a court of law. *In re Hoeveler and McTighe*, 107.
2. The Commissioner of the General Land Office cannot cancel or annul the action of his predecessor. *Welton v. Carter*, 587.

DILIGENCE. See **FRAUDULENT CONVEYANCES**, 7.

DISCRETION. See **JUDICIAL DISCRETION**; **MANDAMUS**, 2.

DISTRIBUTION. See **ADMINISTRATION**, 7.

DURESS.

1. Where a wife is induced to execute a deed conveying her real estate, under the influence of threats that otherwise her husband would be prosecuted criminally, the deed is not to be considered as her voluntary act, and may be avoided by her. *Merchant v. Cook*, 145.
2. In such a case, it is immaterial whether or not the vendee took active steps to procure the execution of the deed, so long as it was for his benefit. *Id.*

DYING DECLARATIONS. See **CRIMINAL LAW**, 7.

EASEMENTS. See **PARTY WALLS**, 2.

EJECTMENT.

Two or more tenants in common may, in this District, join in an action of ejectment. *Wheat v. Morris*, 11.

EMINENT DOMAIN. See **CONDEMNATION OF LAND**.

EMPLOYER AND EMPLOYEE.

3. Employers are not liable to an employee for the consequences of their negligence resulting in an accident, if the employee before the cause of action occurred, knew of the facts constituting negligence, and made no complaint to his employers, but willingly exposed himself to injury, without any promise on their part to remedy the defects. *Birmingham v. Pettit*, 209.

ENDORSER. See **PRINCIPAL AND SURETY**, 1.

ENGLISH BRICK. See **EVIDENCE**, 2.

EQUITY. See **CONTRACTS**, 1; **FRAUDULENT CONVEYANCES**; **HUSBAND AND WIFE**, 3; **LEASE**; **MANDAMUS**, 3; **MORTGAGES**; **PARTITION**; **PARTY WALLS**; **PRINCIPAL AND SURETY**, 2.

EQUITY PLEADING AND PRACTICE. See **AUDITOR**, 5.

1. When two defendants file papers purporting to be their respective answers to a bill in equity, but each defendant signs and verifies, not his own, but the paper purporting to be the answer of the other, the bill may be treated as unanswered. *De Walt v. Doran*, 163.

ESTATES BY THE CURTESY. See **CURTESY**.

ESTOPPEL. See **STREETS AND SIDEWALKS**, 2.

EVIDENCE. See CLOUD ON TITLE; CONTRACTS, 7; CRIMINAL LAW, 6, 7, 8, 10, 12, 19; NEGLIGENCE, 5, 7, 8; PLEADING AND PRACTICE, 2; SLAVE MARRIAGES, 1.

1. A wife is not a competent witness for her husband. The fact that she has been constituted the agent of the parties to a suit in which her husband is a defendant does not render her competent, as the parties must be presumed to have selected her as such, with reference to her existing incapacity to testify. *Haller v. Clark*, 128.
2. The Court may take cognizance of matters of history sufficiently to know the facts in regard to the shipment of English brick to this country. *Id.*
3. When the objection to a question put to a witness, or the objection to his answer, is general, without the statement of any reason or grounds upon which the objection is made, neither the objection nor any exception that is sought to be saved under it is of any validity. *Rapley v. Shehan*, 152.
4. The report as to the cause of a boiler explosion, made by official inspectors, and filed with the Commissioners of the D. C. four days after an accident, the making of which report is not required by any law or regulation of the Commissioners, and which contains the *ex parte* statements of witnesses, is not admissible in a suit for damages against the owners of the boiler for injuries resulting from such accident, as evidence tending to prove the liability of the defendant; following *Moore vs. Langdon*, 2 Mackey, 131. *Birmingham v. Pettit*, 209.
5. The question whether evidence offered at a trial is properly admissible in rebuttal, is in the discretion of the trial court and is not reviewable on appeal; following *Prindle vs. Campbell*, 18 D. C., 605. *Id.*
6. Where writings contain peculiar words of art, or phrases used in commerce or trade, the determination of the meaning of such words or phrases should be left to the jury; but subject to this ascertainment by the jury, it is for the court to decide the meaning of written instruments. *Payne v. Pomeroy*, 243.

EVIDENCE, OBJECTIONS TO. See OBJECTIONS TO EVIDENCE.

EXCAVATIONS. See STREETS AND HIGHWAYS.

EXCEPTIONS. See AUDITOR; EVIDENCE, 3.

EXCEPTIONS, BILL OF. See BILL OF EXCEPTIONS.

EXCEPTIONS TO AUDITOR'S REPORT. See AUDITOR.

EXECUTION. See JUDGMENTS, 1, 6.

- EXECUTION, POSTPONEMENT OF.** See **INSANITY.**
- EXECUTORS AND ADMINISTRATORS.** See **ADMINISTRATION** ;
ADMINISTRATORS.
- EXPERT TESTIMONY.** See **INSANITY** ; **ROCK CREEK PARK** ; **WITNESSES, 2.**
- FACT, MISTAKE OF.** See **PAYMENT.**
- FALSE AND FRAUDULENT MISREPRESENTATION.** See
FRAUDULENT CONVEYANCES.
- FEEES.** See **CONTINGENT FEES** ; **PLEADING AND PRACTICE, 28.**
- FEEES OF AUDITOR.** See **AUDITOR, 3.**
- FEEES OF WITNESSES.** See **ROCK CREEK PARK** ; **WITNESSES, 2.**
- FOREIGN ADMINISTRATORS.** See **ADMINISTRATION, 5, 6, 7, 8.**
- FOREIGN ATTACHMENT.** See **JURISDICTION.**
- FORUM, LAW OF THE.** See **JUDGMENTS, 5.**
- FRAUD.** See **ASSIGNMENTS** ; **CONTRACTS** ; **REAL ESTATE AGENTS** ;
CRIMINAL LAW, 24, 25 ; **DEPARTMENTAL DECISIONS** ; **FRAUDULENT CONVEYANCES** ; **MANDAMUS, 3** ; **PROMISSORY NOTES, 3** ; **UNDUE INFLUENCE.**
- FRAUDS, STATUTE OF.** See **STATUTE OF FRAUDS.**
- FRAUDULENT CONVEYANCES.** See **ASSIGNMENTS, 2.**
- FRAUDULENT MISEPRESENTATION.** See **CONTRACTS** ; **FRAUDULENT CONVEYANCES, 2** ; **REAL ESTATE AGENTS, 2.**
1. In a suit in equity to set aside a conveyance as fraudulent, if defendant's attorneys who drafted the conveyance refuse to answer a question as to whether the deed was not prepared in order to avoid the effect of a judgment, such refusal is a suspicious circumstance. *DeWalt v. Doran, 163.*
 2. A false statement of the consideration for a transfer tends to deceive creditors, and is a badge of fraud. *Id.*
 3. If the consideration for an alleged fraudulent conveyance is promissory notes having an unusual time to run, such circumstance would be a badge of fraud. *Id.*
 4. When circumstances exist raising a doubt as to the fairness of an alleged fraudulent conveyance, the vendee must prove an adequate consideration. *Id.*
 5. The omission of the grantee in a suit to set aside an alleged fraudulent conveyance, to testify, or to produce the debtor or any other important witness, is the ground for an unfavorable presump-

- tion, and frequently exercises an important influence upon the final determination of the question of fraud. *Id.*
6. In such a suit the defendant should produce all the proof that may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud. Such proof is vital to uphold a transaction in other respects surrounded with suspicion. *Id.*
 7. If the grantee in such a case has knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or has the means of knowing such fact by the use of ordinary diligence, he will be chargeable with notice, and such circumstances are equivalent to actual notice, in contemplation of law. *Id.*
 8. It is not necessary in such a case that the debtor and the grantee shall be actuated by like motives, to cheat and defraud the grantor's creditors. If with such knowledge of facts as would put a prudent man on inquiry, or leave him to infer a purpose to hinder, delay or defraud creditors, the grantee purchases because he considers the property cheap, and this is the only motive that induces him to purchase, or because he desires to save a debt due to him by the grantors, the transfer is nevertheless fraudulent. *Id.*
 9. The only proof usually attainable in an action to set aside a deed as fraudulent, is derived from the assembling of a variety of incidents, each perhaps trivial in itself, but which, by an induction of particulars, may suffice to bring conviction to the minds of the court. These must together amount to proof so as to satisfy the conscience of the court, because the presumption is in favor of the validity of the deed; but when these suspicious circumstances on the part of the grantor have been shown, and the grantee, with means of proof in his own hands, refuses or neglects to say a word to satisfy the conscience of the court and relieve himself from the charge of turpitude, the only possible conclusion is against the fairness of the transaction. *Id.*

FRIVOLOUS DEMURRER. See PROMISSORY NOTES, 2.

"FULL FAITH AND CREDIT." See JUDGMENTS, 6.

GAMBLING. See GAMING CONTRACTS.

GAMING CONTRACTS.

1. The Statute of 9th Anne, Ch. 14, Sec. 1, relating to gaming contracts, is in force in the District of Columbia. *Sully v. Morgan*, 88.

2. A plea to an action on a promissory note, setting up as a defence that the consideration of the note was a wager upon the difference in the rise and fall of stocks, is a good plea in bar, even as against a *bona fide* purchaser of the note without notice. The doctrine announced in *Justh v. Holliday*, 2 Mack. 346, approved. *Id.*

GAS BOXES IN SIDEWALKS. See *STREETS AND HIGHWAYS*, 2, 3.

GOODS, RECEIVING STOLEN. See *CRIMINAL LAW*, 24, 25.

HEADS OF DEPARTMENTS, DECISIONS BY. See *DEPARTMENTAL DECISIONS*.

HEIRS. See *ADMINISTRATION*, 1, 2.

HUSBAND AND WIFE. See *CURTESY*; *DURESS*, 1; *EVIDENCE*, 1; *PARTITION*, 2; *SLAVE MARRIAGES*; *TRUSTS*, 1.

1. Where the consideration for the conveyance of real estate from a husband to his wife, through the medium of a third party, consisted of her earnings and of savings of money which had been given to her by her husband, and moneys which she had received as a present from him at the time of executing deeds for him; which moneys she gave to her husband, who invested the same in real estate speculations from which profits resulted, and the husband credited her with such profits on the execution of the deed of conveyance to her, it was *held* that such money was not her separate property, and could form no valid consideration for such conveyance as against the husband's creditors. *Petingale v. Barker*, 156.
2. The promissory note of a married woman given to secure her husband's debt is void. *Id.*
3. Equity will, when the circumstances seem to require it, treat a conveyance by a wife of real estate apparently hers, but in law the property of her husband, in which conveyance her husband unites, as a conveyance by the husband. *Id.*

IDENTITY OF NAMES. See *CLOUD ON TITLE*, 1.

INCORPORATION. See *NOTICE*.

INDEPENDENT CONTRACTOR.

- Where there is no evidence tending to show that an accident occurred at the time of, or as incident to the work done by an independent contractor, the principle of the responsibility of an independent contractor does not apply. *Woods v. Trinity Parish*, 540.

INDICTMENT. See *CRIMINAL LAW*, 1, 20, 24.

INFANCY. See TRUSTS.

INJUNCTION. See PARTY WALLS.

INNOCENT PURCHASER. See ASSIGNMENTS, 2, 3; MORTGAGES, 2; PURCHASER.

INSANITY.

1. On a petition for an order postponing the execution of a criminal alleged to be insane, the court is required, before it can nullify the verdict of the jury and the judgment and sentence, to find that the prisoner is actually insane, so as to be wholly unconscious of his situation. *Ex parte Schneider*, 433.
2. On an inquiry instituted for that purpose, the opinions of witnesses, not examined as experts, as to the sanity or insanity of the prisoner, should be based only upon the facts testified to by the particular witnesses. *Id.*
3. Wickedness is not insanity, and no matter how vile a man may be, he is not to be exculpated and freed from punishment, simply because he is shown to be enormously bad. *Id.*
4. When the facts testified to by a witness as the ground of his opinion are few or trivial, or simply such incidents as are common alike to sane and insane people, it is improper to ask for an opinion, for it can have no probative force. *Id.*

INSTRUCTIONS TO JURY. See CRIMINAL LAW, 16; PLEADING AND PRACTICE, 8, 22, 24, 25, 26.

INSURANCE. See LIFE INSURANCE.

INTENT. See CRIMINAL LAW, 24, 25.

INTEREST. See ATTORNEY AND CLIENT, 1.

1. Interest runs on all judgments in this jurisdiction, whether they are rendered in actions of contract or actions of tort. *Costello v. District of Columbia*, 508.
2. In this jurisdiction a jury has no right, in returning its verdict in an action of tort, to select an antecedent day at its discretion, and say that interest shall run from that day upon the amount of the verdict.
3. When such a verdict is returned, this court has a right to refrain from granting a new trial if the plaintiff will enter a *remitter* of interest unlawfully allowed, but otherwise to grant a new trial.

INTEREST ON LEGACIES. See ADMINISTRATION, 4.

INTERESTED WITNESSES. See CRIMINAL LAW, 14.

JOINDER OF PARTIES. See EJECTMENT.

JOINT ACTION. See PROMISSORY NOTES.

JOINT OBLIGORS. See PROMISSORY NOTES, 1.

JUDGMENTS. See ADMINISTRATION, 2; INTEREST, 1.

1. There are three remedies upon a judgment: first, an execution; second, a writ of *scire facias* if execution is delayed, which results in a new judgment; and third, an action of debt, which also results in a new judgment. *Waddill v. Cabell*, 597.
2. An action of debt cannot be maintained in this District upon a judgment after it has been of twelve years' standing. *Id.*
3. In this District there can be no proceeding upon a foreign judgment other than an action of debt, and the right of action accrues when the judgment is rendered. *Id.*
4. The statute of limitations in applying to bonds, judgments and other specialties, etc., embraces both foreign and domestic judgments. *Id.*
5. A right of action upon a foreign judgment is subject to the law of limitations of the *forum* in which it is attempted to be enforced. *Id.*
6. An execution issued in a foreign jurisdiction on a judgment rendered there, is not a judicial determination of anything, and is not an act to which full faith and credit is to be given by the courts of another jurisdiction, within the meaning of the Constitution and the act of Congress of May 26, 1790 (1 Stat. 122). Such an execution can have no effect in another jurisdiction. *Id.*
7. No recovery can be had in this District upon a judgment of the State of Virginia, where the judgment was obtained more than twelve years prior to the attempt to enforce it here, and more than twelve years elapsed during which no effort was made to enforce it in that State, notwithstanding a Virginia statute which kept the judgment alive in that jurisdiction until the filing of the action here. *Id.*

JUDGMENTS, ASSIGNMENT OF.

W, while the holder of a judgment against B, was adjudged a bankrupt; after W's death and before the settlement of the bankruptcy proceedings, his executrix, G, endeavored to revive said judgment by proceedings in *scire facias*; B filed a bill to restrain the enforcement of the judgment of *fiat*, on the ground of fraud in G, and that she had no title to the judgment after the assignment, making the assignee a party defendant. G demurred, and demurrer was overruled (6 Mack., 447). G

answered, and refuted the charges of fraud, and assignee filed a cross-bill, averring that he was entitled to collect the judgment so revived, and praying that G should be held to be vested with a beneficial interest in the judgment as trustee for him and be required to assign same to him as assignee. *Held*, that the bill must be dismissed, and the assignee having by his cross-bill affirmed G's action, the relief prayed in the cross-bill must be granted. *Brown v. Wygant*, 16.

JUDGMENTS, INTEREST ON. See INTEREST, 1.

JUDGMENTS OF NON-SUIT. See NON-SUIT.

JUDGMENTS, REVIVAL OF. See SCIRE FACIAS.

JUDICIAL COGNIZANCE. See EVIDENCE, 2.

JUDICIAL DISCRETION. See AUDITOR, 3; CRIMINAL LAW, 12; EVIDENCE, 5; PLEADING AND PRACTICE, 15.

JURISDICTION. See ADMINISTRATION, 2, 5, 8; PRINCIPAL AND SURETY, 2.

1. This Court, under Sec. 769, R. S. D. C., has no jurisdiction of suits cognizable by Justices of the Peace, when the sum in controversy is less than \$50, and cannot take jurisdiction of a suit involving less than that sum, in order to allow the plaintiff to begin attachment proceedings against the defendant. *Singleton v. Frank*, 46.
2. The Supreme Court of the District of Columbia has jurisdiction in equity suits brought to enforce mechanics' liens, notwithstanding the amount involved may be less than \$50. *Hollohan v. Young*, 183.
3. Neither Section 769 R. S. D. C., nor the Maryland Act of 1777, Ch. 41, which is in force here, controls such a case, but the proceedings are governed by the act of July 2, 1884 (1 Rich. Supp., 447-449). *Id.*
4. Any inconvenience which may arise from the prosecution in equity of such petty claims under the Mechanics' Lien law, cannot interfere with the duty of the court to enforce the clear right given to the suitor. *Id.*

JURORS, COMPETENCY OF. See CRIMINAL LAW, 3, 4, 5, 21, 22, 23.

JURY, CHARGE TO. See CHARGE TO JURY.

JURY, INSTRUCTIONS TO. See INSTRUCTIONS TO JURY.

JURY, QUESTIONS FOR. See NEGLIGENCE, 4.

JURY SERVICE, EXEMPTION FROM. See CRIMINAL LAW, 23.

JUSTICES OF THE PEACE. See JURISDICTION.

LEASE.

Where one of two joint lessees of land with a privilege of purchase, purchases the land from the lessor, the purchase enures to the benefit of his co-lessee. *Barbour v. Johnson*, 40.

LEGACIES. See TRUSTS, 4.

LEGACIES, INTEREST ON. See ADMINISTRATION, 4.

LEX FORI. See JUDGMENTS, 5.

LICENSE. See POLICE REGULATIONS.

LIENS. See MECHANICS' LIENS. •

LIFE INSURANCE.

1. A circular issued by an insurance company, and sent to a policy holder, stating that "Every policy upon which two or more annual premiums have been paid has a cash value payable when application is made therefor upon the anniversary of any subsequent premium, provided a legal discharge can be given," applies to policies existing, as well as to those which might be taken out in the future, especially when the insured under an existing policy has been led to change his position to his detriment by reason of such circular. *Webster v. Insurance Co.*, 227.
2. When a policy having a cash surrender value is made payable to the insured, his executors, administrators and assigns "for the benefit of his wife, if she shall survive him, otherwise for the benefit of his then surviving children, and the then surviving descendants of any then deceased child or children, instead of such deceased child or children respectively, subject however, to any provisions or conditions made by the will" of the insured, and insured is eighty years of age, and has survived his wife, and but two adult children survive, neither of whom is dependent upon their father, the insured and his two children, upon their application to the company can legally compel the payment of the surrender value, and their agreement and acquittance will fully exonerate and protect the company on such payment. *Id.*

LIMITATIONS. See STATUTE OF LIMITATIONS; TRUSTS.

LÍQUOR TRAFFIC. See POLICE REGULATIONS.

MALICE, PRESUMPTION OF. See CRIMINAL LAW, 8.

MANDAMUS. See **POSTMASTERS' SALARIES.**

1. The Commissioner of the General Land Office cannot cancel or annul the action of his predecessor. *Welton v. Carter*, 587.
2. Unless there is a plain duty on the part of an official as to which there is no room for discretion, the remedy by *mandamus* is inadmissible. *Id.*
3. After a patent for land has issued, it can never be recalled by the Executive Department. It can only be set aside by a suit in equity by the United States, on the ground of fraud. *Id.*

MARRIAGE. See **SLAVE MARRIAGES.****MARRIED WOMEN.** See **HUSBAND AND WIFE.****MECHANICS' LIENS.** See **JURISDICTION**, 2, 3, 4.

1. A sub-contractor who postpones filing his notice of lien until the principal part of the contract price has been paid by the owner to the contractor, can assert a lien on the property only to the extent of what remains due under the contract. In such a case the lien has no retroactive effect, but operates only from the date of filing. *Whelan v. Young*, 51.
2. The rights of a sub-contractor are statutory and do not grow out of any privity of contract with the owner. *Id.*
3. It is the duty of sub-contractors in the exercise of the privileges granted them by the mechanics' lien law, to use such diligence as to avert loss to every one interested. *Id.*
4. If in a suit to enforce a mechanics' lien it appears that certain parts of the contractor's work were accepted by the defendant after they were completed, such acceptance implies that the work is to be paid for, and it is too late to renew objections that had thus been waived, after suit is brought. *Haller v. Clark*, 128.

MILEAGE EXPENSES. See **ROCK CREEK PARK**, 1.**MISREPRESENTATION.** See **CONTRACTS**; **FRAUDULENT CONVEYANCES**, 2; **PROMISSORY NOTES**, 3; **REAL ESTATE AGENTS**, 2.**MISTAKE OF FACT.** See **PAYMENT**, 1.**MORTGAGES.**

1. When an absolute deed and a defeasance relating to the same transaction are executed at the same time, they must be considered together, and when so considered in equity, as between the parties, the deed because of the defeasance, must be held to be a mortgage. *Waters v. Williamson*, 24.
2. When a party holding by virtue of a deed absolute on its face, but which in equity will be considered as a mortgage, mortgages

the same property to a third person for value, such person takes only the rights of his grantor, unless the facts are such as to cause him to be regarded as an innocent purchaser. *Id.*

MOTION TO DISMISS APPEAL. See **APPEALS**, 2.

MOTIVE. See **CRIMINAL LAW**, 17.

MURDER. See **CRIMINAL LAW**.

NAMES, IDENTITY OF. See **CLOUD ON TITLE**, 1.

NECESSARIES. See **TRUSTS**, 4.

NEGLIGENCE. See **ADMINISTRATION**, 5; **EMPLOYER AND EMPLOYEE**; **INDEPENDENT CONTRACTOR**; **STREETS AND HIGHWAYS**.

1. The care required of one to prevent an accident is that degree of care which may reasonably be expected from one in his situation. What will be deemed reasonable care in any case will depend upon the particular circumstances of that particular case. *Greenwell v. Market Co.*, 298.
2. The mere act of jumping from a car in motion, but not at a high speed, does not in itself constitute contributory negligence in law. *Jones v. Railroad Co.*, 346.
3. Where a passenger was injured while alighting from a train from Washington to Baltimore, which he had boarded by mistake in consequence of a misleading direction by an employee within the station whom he had asked to point out the train for Gaithersburg; it was competent for him to testify, as bearing upon the question of negligence on the part of the company, that there were no signs, within the station, indicating the destination of the different trains, since the absence of such signs left the passengers wholly dependent for such information upon the officials, and the company might well be held responsible for such misdirection by its officials, resulting in injury to the travellers. *Id.*
4. Where a question arises upon a state of facts, upon which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ. *Id.*
5. In an action for damages for personal injuries alleged to have been caused by the negligence of the defendant, a question put to a witness as to whether the manner in which he had recommended

work to be done, was the proper way to do it, is irrelevant and immaterial when no testimony was offered to indicate that the accident was caused by the failure to do such work. *Woods v. Trinity Parish*, 540.

6. If a person, while standing upon a paved and unenclosed place apparently a part of the public sidewalk, though really a part of the public parking, but where the public had a right to be, is injured by the fall of a shutter negligently secured to the defendant's building, the liability of the defendant for such negligence is as great as if plaintiff were standing upon the sidewalk itself. *Id.*
7. In such a case, the evidence of a witness as to the point where the shutter struck upon the ground is competent as indicating a fresh break, although the witness did not see the shutter fall, but only saw the mark of a fresh break upon the pavement, and was told that was where the shutter fell. *Id.*
8. When the declaration in an action for damages for alleged negligence, avers knowledge of defects, it is not essential for the plaintiff to establish by a preponderance of testimony that the defendant knew of defects, so long as the evidence indicates that defendant knew or might reasonably have known of them. *Id.*

NEWLY-DISCOVERED EVIDENCE. See **CRIMINAL LAW**, 19.

NEW TRIAL. See **CRIMINAL LAW**, 19; **INTEREST**, 3; **PLEADING AND PRACTICE**, 2, 22, 23.

NON-SUIT. See **PLEADING AND PRACTICE**, 10, 11, 12, 13.

NOTES. See **PROMISSORY NOTES**.

NOTICE. See **GAMING CONTRACTS**, 2; **NEGLIGENCE**, 8; **PROMISSORY NOTES**, 5; **STREETS AND HIGHWAYS**.

The filing of articles of incorporation of a railroad company in the proper office therefor, reciting the ownership of property, is not notice to the public that the title to the property which had previously been in another party, is in the incorporation. *Payne v. Pomeroy*, 243.

NOTICE OF LIEN. See **MECHANICS' LIENS**, 1.

OBJECTIONS TO EVIDENCE. See **EVIDENCE**, 3; **PLEADING AND PRACTICE**, 21.

OPINION OF WITNESSES. See **CRIMINAL LAW**, 10.

ORDER OF PROOF. See **CRIMINAL LAW**, 12.

ORPHANS' COURT. See APPEALS, 2, 3; WILLS, 2.

PARTIES TO DEED. See MORTGAGES.

PARTITION.

1. Equity will not decree partition of real estate while the title is in dispute between the parties. If the complainants aver title, and the title is disputed, equity will either dismiss the bill or retain the cause in order that the question of title may be determined by a suit at law. *Howard v. Howard*, 224.
2. The heirs of a deceased wife, who inherit her real estate, are not entitled to partition thereof during the life of the tenant by the curtesy. *Barrett v. Byrne*, 274.

PARTY WALLS.

1. One of the uses of a party wall being to afford a complete division between adjoining houses, the opening of windows in such a wall by one owner to the discomfort and inconvenience of the adjoining owner, is an injury which equity will redress by injunction; following *Corcoran v. Nailor*, 6 Mackey, 580. *Bartley v. Spaulding*, 47.
2. One who erects a party wall between his land and his neighbor's, is the owner of the entire wall, subject to the right of his neighbor to use the wall on payment of one-half of the cost of so much thereof as he may use. *Halpine v. Barr*, 331.
3. The purchaser of a lot with a party wall on it in which the adjoining owner has not exercised his rights, succeeds to the rights of the first builder, and he, and not the first builder, is entitled to compensation for the use thereof by such adjoining owner. *Id.*

PASSENGERS. See NEGLIGENCE, 3; RAILROADS, 1, 2, 3.

PATENTS. See APPEALS, 4, 5.

PATENTS, COMMISSIONER OF. See COMMISSIONER OF PATENTS.

PATENTS FOR LAND. See MANDAMUS, 3.

PAYMASTER. See PAYMENT, 2.

PAYMENT.

1. When an army officer has received his salary for a certain period, and subsequently assigns his pay to another for the same period, and the assignee receives from a different paymaster the salary thus assigned to him, such paymaster being ignorant of the former payment, the assignee may be compelled to refund the amount received by him, as having been paid under a mistake of fact. *United States v. Phillips*, 309.

2. When such a payment has been made by check on the United States Treasury, the loss is not that of the paymaster, but of the government, and the United States may, in its own name, maintain an action to recover the sum improperly paid, notwithstanding it has allowed the paymaster credit for the wrongful payment. *Id.*

PEDESTRIANS. See STREETS AND HIGHWAYS.

PERSONAL INJURIES. See NEGLIGENCE.

PLEADING AND PRACTICE. See ADMINISTRATION, 2; APPEALS; CRIMINAL LAW, 1, 12, 13, 17, 18; EJECTMENT; EQUITY PLEADING AND PRACTICE; EVIDENCE, 5; SCIRE FACIAS; SET-OFF; SEVENTY-THIRD RULE; VARIANCE.

1. When a motion is made to dismiss an appeal because there is no record on which the appeal could be heard, appellant's counsel having died pending the litigation, the motion will not be entertained until notice of a motion is served upon appellant requiring him to employ new counsel. *Moses v. Fitts*, 97.
2. Upon an appeal from an order overruling a motion for a new trial on the ground that the verdict was against the weight of the evidence, this court will not reverse the judgment below unless it shall clearly appear that the evidence was entirely insufficient to justify the verdict. *Rapley v. Shehan*, 152.
3. The character in which a plaintiff sues is sufficiently stated in the words: "The plaintiff, A., administrator of B., deceased, sues the defendants, etc." It is not necessary for an administrator in his declaration to state from what court he received his letters of administration. *Jordan v. Hamlink*, 189.
4. The rule of this court which authorizes the bringing on of a demurrer for argument on five days' notice is not invalid; overruling *Knoedler v. Meley*, 2 MacA., 240. *Id.*
5. Where the October Term of the court below was prolonged from time to time, until April 4th (in the January Term), for the purpose of signing a bill of exceptions, and exceptions were not presented on April 4th, but were presented and signed on the 11th of April, seven days after the prolonged term had expired, it was held that such bill of exceptions came too late. *Battelle v. Denison*, 195.
6. If a bill of exceptions is without authority of law, this court in General Term is under no obligation to look into the other questions which are raised by the record. *Id.*
7. Where a bill of exceptions refers to a paper offered in evidence, but not set out therein, and the paper is not authenticated so

- as to identify it before the appellate court, that court will not necessarily consider it. *Birmingham v. Pettit*, 209.
8. Where several prayers are offered as a whole or series, some of which are wrong and some right, the trial court has a right to reject them all. *Id.*
 9. Where a record on appeal states that the portions of the charge of the court below excepted to, are printed in smaller type, and those portions as printed comprise five pages of the record, the exception is too general, and will not be considered by the appellate court; following *Langdon v. Evans*, 3 Mackey, 1. *Id.*
 10. A trial court, at the request of the plaintiff made at any time before verdict, even after a motion is granted to direct a verdict for the defendant, is obliged to enter a judgment of non-suit. *Jackson v. Merritt*, 276.
 11. A trial court cannot properly allow a voluntary non-suit with leave to strike it out at another day, nor has it a right to strike out a voluntary non-suit once entered. *Id.*
 12. The statute of 2 Henry IV., Chap. 7, relating to non-suits, is in force in this District. *Id.*
 13. No such thing as a compulsory non-suit is known to procedure in this jurisdiction. *Id.*
 14. An appeal or exception presupposes a judgment or decree; hence, there can be no appeal from a mere opinion of the court. *Id.*
 15. A trial court may withdraw a case from the jury, and direct a verdict, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Greenwell v. Market Co.*, 298.
 16. If no reason is assigned for objecting to testimony, and the testimony is admissible for any purpose, it is error to exclude it. *Jones v. Railroad Co.*, 346.
 17. A general exception to the admission of evidence without specifically pointing out the ground therefor will not be considered on appeal. *Bell v. Sheridan*, 370.
 18. When a motion to take a case from the jury, is overruled, and an exception noted, the exception is considered waived if counsel excepting afterwards produces other testimony. *Id.*
 19. Where the charge of a trial court contains any propositions which are correctly stated, a general exception to the charge, specifying no particular errors will not be noticed on appeal. *Id.*
 20. Where a bill of exceptions purports to set forth all the evidence, but it is apparent from other statements therein that evidence

was offered which is not set forth, an appellate court will not attempt to determine the sufficiency of the evidence to sustain the verdict. *Id.*

21. A bill of exceptions should not include all the evidence upon points about which there is no controversy; and when the trial court in charging the jury, comments upon evidence not set forth in the bill of exceptions, and the record does not disclose any objection made at the time to such comments, an appellate court will presume the testimony referred to was before the jury. *United States v. Lowenstein*, 515.
22. The rule is that where instructions are inconsistent, the court cannot tell which one the jury followed, and if there is error in either, there must be a new trial. *Boswell v. District of Columbia*, 526.
23. Sec. 805, R. S. D. C. confers the *alternative* right, upon the overruling of a motion for a new trial and an appeal taken, to have a bill of exceptions, or case, settled in the usual manner. Both are not authorized. *Woods v. Trinity Parish*, 540.
24. A prayer for an instruction based upon a condition of affairs as to which there is no evidence, should be refused. *Id.*
25. An instruction is bad which directs the jury that a particular circumstance is not of itself necessarily a defence, thereby indicating to them that they might disregard it in considering the case, whereas such circumstance tended as an element to establish a defence. *Id.*
26. A mere abstract proposition of law offered as an instruction is properly refused. *Id.*
27. The General Term will not entertain upon *ex parte* affidavits, a motion to re-tax costs, when the question involved is as to the number of days during which witnesses attended court. *Robertson v. Stahl*, 617.
28. Sections 823 and 824 of the R. S. U. S. apply to the courts of this District, and provide for a docket fee of twenty dollars to the successful attorney, after a jury trial. Section 903 R. S. D. C. is no longer applicable to such cases. *Id.*

PLENE ADMINISTRAVIT. See *SCIRE FACIAS*, I.

POLICE REGULATIONS.

1. The joint resolution passed by Congress, February 26, 1892, (27 Stat., 394), did not confer upon the Commissioners the power to enact a regulation prescribing a penalty for keeping an unlicensed bar. *In re Sullivan*, 139.

2. The reference in the joint resolution to the act of Congress of January 26, 1887, (24 Stat., 368), has the effect to make the classes of regulations provided for by that act, illustrations of what is meant in the resolution by regulations for the protection of "lives, limbs, health, comfort and quiet." *Id.*
3. It is to matters which by their own operation, may affect life, limb, health, comfort or quiet, that the Commissioners' authority under this resolution is strictly limited. Before it can be said that the keeping of a bar room without a license is a subject which falls within this power, it must appear that such a bar room, although conducted in precisely the same manner with those that are licensed, is by reason of its want of license distinguishable from the latter as to its effect on health or public comfort or quiet. *Id.*
4. The failure to obtain a license is not necessarily an act which in itself is capable of affecting health or quiet or comfort. *Id.*

POLICY OF INSURANCE. See LIFE INSURANCE.

POSTMASTERS' SALARIES.

1. The act of Congress of June 12, 1866, (14 Stat., p. 60), relating to postmasters' salaries, merely defines the occasion which shall make imperative a readjustment of a salary to be paid after that date. It does not affect salaries allowed for expired terms. *Trask v. Wanamaker*, 119.
2. The act of Congress of March 3, 1883, (22 Stat., p. 487), for the first time, provided for readjustment of postmasters' salaries for terms which had expired, but this act refers only to a readjustment of salaries under the act of 1866, which was prospective in its operation. It did not affect salaries which had theretofore been readjusted.

POSTPONEMENT OF TRIAL. See CRIMINAL LAW, 2.

PRACTICE AND PROCEDURE. See EQUITY PLEADING AND PRACTICE; PLEADING AND PRACTICE.

PRAYERS. See INSTRUCTIONS TO JURY.

PREFERRED CREDITORS. See ASSIGNMENTS, 1.

PRESUMPTIONS. See CRIMINAL LAW, 25; PLEADING AND PRACTICE, 2; SLAVE MARRIAGES.

PRINCIPAL AND AGENT. See EVIDENCE, 1; RAILROADS, 2; REAL ESTATE AGENTS.

PRINCIPAL AND SURETY. See BONDS.

1. Where a promissory note is endorsed by the payee, and is subse-

quently endorsed by a second endorser who has no interest in the matter, and the payee takes up the note at maturity, he cannot maintain a suit against the second endorser for contribution, unless there was an express agreement between them that they were to be co-sureties. *Buscher v. Murray*, 612.

2. A surety has a complete remedy at law where he desires to recover a contribution from his co-surety, and equity, therefore, cannot take jurisdiction. *Id.*

PRIVITY OF CONTRACT. See MECHANICS' LIENS.

PROCEDURE. See PLEADING AND PRACTICE.

PROMISSORY NOTES. See CONSIDERATION, 2; CONTRACTS, 6; FRAUDULENT CONVEYANCES, 3; GAMING CONTRACTS, 2; HUSBAND AND WIFE, 2; PRINCIPAL AND SURETY.

1. Under Sec. 827, R. S. D. C., a joint action is maintainable against the maker and endorser of a promissory note. *Hoffecker v. Moon*, 263.
2. Where in a declaration on a promissory note, it is alleged that demand was made at maturity, and the time of maturity is shown, a demurrex on the ground that the date of the note was not given, is frivolous. *Id.*
3. In an action against the maker of a promissory note given for the price of goods, it is competent for the maker to prove in reduction of damages that the sale was effected by fraud and misrepresentation on the part of the payee as to the value of the goods, although the goods have neither been returned nor tendered. *Bell v. Sheridan*, 370.
4. Such proof of fraud, showing a total want of consideration, may be introduced without pleading it specially or giving special notice thereof before the trial. *Id.*
5. In an action by a payee of a promissory note against the maker thereof, when a special notice is necessary before trial that the maker expects to introduce evidence showing that the goods for the price of which the note was given were not worth the sum named therein, and that the note was procured through the fraud of the payee, pleas setting forth lack of consideration and fraud by the payee, accompanied by an affidavit setting forth the facts relied on as a defence, constitute a sufficient notice. *Id.*

PROOF, ORDER OF. See CRIMINAL LAW, 12.

PUBLIC HEALTH AND COMFORT. See POLICE REGULATIONS, 2, 3, 4.

PURCHASERS. See ASSIGNMENTS, 3, 4; GAMING CONTRACTS, 2; REAL ESTATE AGENTS, 2; TRUSTS, 2, 3.

RAILROADS. See NEGLIGENCE, 2, 3.

1. Where a railroad ticket is purchased, which on its face is good for a continuous passage over connecting roads from one point to another, if from any cause not the fault of the passenger or the result of his carelessness or wrong, the company is prevented from making a connection according to the letter of its contract, in carrying the passenger to his destination, and he is left over, he has a right to go upon the first train of the company to his point of destination, and is in no sense a trespasser in attempting properly to exercise that right. *Watkins v. Railroad Co.*, 1.
2. When a railroad company sells a ticket for passage over connecting roads, from one point to another, the trains operated upon the connecting lines are regarded for this purpose as the trains of the contracting company, and each of the connecting companies and their employees are to be treated as the agents and employees of the contracting company. *Id.*
3. If the holder of such a ticket in attempting, properly and lawfully to exercise his legal right to go upon the train of one of the connecting companies, is interrupted by the gate-keeper, and assaulted by him, the contracting company is liable in an action for damages resulting from that assault. *Id.*
4. In making or breaking up a train in a city station, the temporary use by the railroad company occupying the station of an adjacent street may be necessary; and to that extent, the authority to use the street grows out of the necessities of the case and is a necessary incident to the right to use the road and station. *Glick v. Railroad Co.*, 363.
5. But a railroad company has no right to use its main tracks and sidings for the purpose of assembling or storing cars there, loading or unloading them, or for the general purpose of shifting and making up trains. *Id.*

READJUSTMENT OF POSTMASTERS' SALARIES. See POSTMASTERS' SALARIES.

REAL ESTATE AGENTS.

1. If a real estate agent attempts to act as the agent for another, he will be liable to that other for loss through negligence or misconduct, notwithstanding he makes no charge for his services. *Battelle v. Cushing*, 59.

2. Where a real estate agent points out property, not knowing whether he is right or wrong as to its location, his legal culpability is as great, if the purchaser is deceived by his statement, as if he sins against knowledge, instead of in its absence. *Id.*

REASONABLE CARE. See NEGLIGENCE.

RECEIVING STOLEN GOODS. See CRIMINAL LAW, 24, 25.

RECOUPMENT. See PROMISSORY NOTES, 3, 5.

REGULATIONS. See POLICE REGULATIONS.

REMAINDERS. See TRUSTS.

REMITTITUR. See INTEREST, 3.

REPORTS OF AUDITOR. See AUDITOR.

REPUTATION. See CRIMINAL LAW, 26.

RES JUDICATA. See COMMISSIONER OF PATENTS, 2, 3.

ROCK CREEK PARK.

1. Under the statute relating to the condemnation of land for Rock Creek Park (26 Stat., 492), a reasonable number of expert witnesses who testified before the Commission on behalf of the property owners, in reference to gold deposits, should be paid a fair compensation by the United States in addition to ordinary witness fees, such compensation to include reasonable mileage for traveling expenses actually incurred for attendance upon the Commission alone. *United States v. Cooper*, 491.
2. Practical miners who testified before such Commission as to gold deposits, and who, from long, careful observation, have derived special knowledge upon the subject, are expert witnesses and entitled to compensation as such. *Id.*
3. Under the act of Congress of September 27, 1890 (26 Stat., 492), relating to the condemnation of land for the Rock Creek Park, and appropriating a sum of money to pay "the expenses of inquiry, survey, assessment, *cost of lands taken*, and all other necessary expenses incidental thereto"; such money cannot be applied to the payment of damages to a leasehold of land *not taken*, although included on the original plat of the projected park. *United States v. Cooper*, 605.
4. Where in such proceedings land included in the original plat was *not taken*, but finally excluded, payment will not be made to the owner of fees paid by him to his alleged expert witnesses, to prove the value of a white flint quarry on his land. *Id.*

5. Such witnesses cannot be properly classed as expert witnesses. The subjects as to which they testified are not of a character involving especial skill or peculiar knowledge, but are within the range of ordinary experience. *Id.*

SALARIES OF POSTMASTERS. See POSTMASTERS' SALARIES.

SALARY, ASSIGNMENT OF. See PAYMENT, 1.

SALE OF EQUITABLE INTEREST. See TRUSTS.

SALE OF LAND, VERBAL CONTRACT FOR. See CONTRACTS, 5.

SALES. See CONTRACTS, 4.

SCIRE FACIAS. See JUDGMENTS, 1; JUDGMENTS, ASSIGNMENT OF.

- 1: When a judgment creditor seeks by proceedings in *scire facias* to recover his debt from the representative of a deceased debtor, the plea of *plene administravit* is a proper plea, and if plaintiff desires to reach future assets he should not demur, but should admit its truth, and enter up judgment of assets *quando acciderint*. *Knight v. Welcker*, 324.
2. When infant defendants interpose a plea to a writ of *scire facias*, that they took nothing by descent, and plaintiff desires to show that they took property by devise and not by descent, he should not demur, but should file a replication to the plea. *Id.*
3. A defendant in a *scire facias* proceeding cannot avail himself of the Statute of Limitations by demurrer, but can only do so by plea. *Id.*
4. The plea of the Statute of Limitations to a writ of *scire facias* to revive a judgment will be sustained on demurrer, where the writ does not show affirmatively that steps have been taken within twelve years to enforce the collection of the judgment. *Id.*

SEPARATE ESTATE OF MARRIED WOMEN. See HUSBAND AND WIFE.

SET-OFF. See ATTORNEY AND CLIENT, 2.

SEVENTY-THIRD RULE. See CONSIDERATION, 2.

1. If an affidavit of defence under the 73d rule, as a whole sets up a sufficient defence to the action, an obscurity of statement in particular parts will merely have the effect to condemn such particular statements as of doubtful meaning, and will not invalidate the affidavit. *Lulley v. Morgan*, 88.
2. The seventy-third rule is not intended to operate as a trap, and an affidavit which sets up a valid defence, though inartificially drawn, will be sufficient. *Hodge v. Mason*, 181.

SIDEWALKS. See STREETS AND HIGHWAYS.

SLAVE MARRIAGES.

1. Where two men recognize each other as brothers, and are shown to have done so at a period so remote that it is impossible to find living witnesses acquainted with their ancestors, the law will allow the jury to presume that their parents were legally married. *Diggs v. Wormley*, 477.
2. The same presumption applies to former slaves, that under such circumstances the marriage of their ancestors was lawful, that is to say, a marriage with the consent of their masters. *Id.*
3. *Quære*, whether it was ever necessary in this District, for the purpose of legitimating the issue of slaves, to prove a marriage *in facie ecclesiae*. *Id.*
4. Under the act of Congress of Feb. 6, 1879, (20 Stat., 282), if two colored people, one or the other of whom were slaves, have lived together as husband and wife for a long period of time, and were reputed to be married, and were so treated and understood to be by their friends and the community in which they lived, they will, for the purpose of inheritance, be regarded as having been lawfully married. *Id.*

STAMP AGENT. See CRIMINAL LAW, 23.

STATUTE OF FRAUDS. See CONTRACTS, I, 7.

STATUTE OF LIMITATIONS. See ADMINISTRATION, 8; JUDGMENTS, 2, 4, 7; SCIRE FACIAS, 3, 4.

STATUTES. See STATUTORY CONSTRUCTION.

The following statutes, among others, referred to, commented upon or explained in the cases cited; and at the pages given.

ACTS OF CONGRESS.

- 1790, May 26, 1 Stats., 122. (Proof of Judicial Proceedings). *Waddill v. Cabell*, 603.
- 1807, March 3. (Attorney's Fee). *Robertson v. Stahl*, 619.
- 1835, March 3. (Charter of B. & O. R. R. Co). *Glick v. R. R. Co.*, 364.
- 1836, July 4, 5 Stats., 107. (Public Lands). *U. S. v. Carter*, 588, 589.
- 1853, Feb. 26. (Attorney's Fee). *Robertson v. Stahl*, 619.
- 1854, June 22. (Postmasters' Commissions). *Trask v. Wanamaker*, 121-125.
- 1859. (Mechanics' Liens). *Hollahan v. Young*, 185.
- 1860. (Confirmation of Land Grant). *U. S. v. Carter*, 587.

- 1863, Mar. 3, 12 Stats., 763. (Trials). *Jordan v. Hamlink*, 192, 193.
 1864, July 1. (Postmasters' Salaries). *Trask v. Wanamaker*, 121-125.
 1866, June 12. (Postmasters' Salaries). *Trask v. Wanamaker*, 120-125.
 1869, 5 Stats., 275. (Adjustment of Land Claims). *U. S. v. Carter*, 587, 588.
 1869, April 10. (Married Woman's Act). *Smith v. Smith*, 291.
 1875, March 3. (Right of Way through Public Lands). *Welton v. Carter*, 591.
 1876, Aug. 15, 19 Stats., 202. (Partition). *Barrett v. Byrne*, 275.
 1877, (Tax Deed). *Scott v. Hyde*, 534.
 1879, Feb. 6, 20 Stats., 282. (Issue of Slave Marriages). *Diggs v. Wormley*, 485-487.
 1883, March 3. (Postmasters' Salaries). *Trask v. Wanamaker*, 121-125.
 1884, July 2, 1 Rich. Supp., 447-449. (Mechanics' Liens). *Whelan v. Young*, 53; *Hollohan v. Young*, 185.
 1885, Feb. 17, 23 Stats., 307. (Damages). *Weaver v. R. R. Co.*, 505, 506.
 1887, (Steam Engineering). *Birmingham v. Pettit*, 212.
 1887, Jan. 26, 24 Stats., 368. (Police Regulations). *In re Sullivan*, 141-143.
 1887, Feb. 28, 24 Stats., 431. (Foreign Executors and Administrators). *Weaver v. R. R. Co.*, 504.
 1889, (Government Officers). *U. S. v. Barber*, 472.
 1892, Feb. 26, 27 Stats., 394. (Licenses). *In re Sullivan*, 141.

REVISED STATUTES, UNITED STATES.

- SECTIONS 823, 824. (Attorney's Fee). *Robertson v. Stahl*, 619, 620.
 886. (Copies of Treasury Records). *U. S. v. Dudley*, 339.
 1033. (List of Witnesses in Capital Cases). *U. S. v. Schneider*, 413.

REVISED STATUTES OF THE DISTRICT OF COLUMBIA.

- SECTIONS 562 to 567. (Incorporation Act). *Jackson v. Merritt*, 277.
 692. (Mechanics' Liens). *Hollohan v. Young*, 185.
 709. (Mechanics' Liens). *Whelan v. Young*, 53.
 724 to 726. (Issue of Slave Marriages). *Diggs v. Wormley*, 487.
 727 to 730. (Married Woman's Act). *Smith v. Smith*, 291.

- 769. (Jurisdiction). *Singleton v. Frank*, 46; *Hollohan v. Young*, 184, 185.
- 801, 802. (Demurrers). *Jordan v. Hamlink*, 190, 193.
- 805. (New Trial). *Woods v. Trinity Parish*, 545.
- 809. (Pleadings in Ejectment). *Wheat v. Morris*, 14, 15.
- 810. (Set-off). *Dale v. Richards*, 321.
- 827. (Joint Obligors). *Hoffecker v. Moon*, 264.
- 875. (Exemption from Jury Duty). *U. S. v. Barber*, 472, 472.
- 903. (Attorney's Fee). *Robertson v. Stahl*, 619.

BRITISH STATUTES.

- 2 Henry IV, ch. 7. (Non-suit). *Jackson v. Merritt*, 285.
- 13 Eliz., ch. 5. (Fraudulent Conveyances). *Fechheimer v. Hollander*, 80-83.
- 27 Eliz., ch. 4. (Fraudulent Conveyances). *Fechheimer v. Hollander*, 80.
- 29 Charles II. (Statute of Frauds). *Kraak v. Fries*, 102-105.
- 9 Anne, ch. 14, sec. 1. (Gambling Debts). *Lulley v. Morgan*, 91.
- 14 Geo. II, ch. 17. (Non-suit). *Jackson v. Merritt*, 286.

ACTS OF MARYLAND.

- 1715. (Limitations). *Weaver v. R. R. Co.*, 506, 507; *Waddill v. Cabell*, 598.
- 1777. (Marriage). *Diggs v. Wormley*, 483, 484, 487.
- 1777 ch. 41. (Jurisdiction). *Hollohan v. Young*, 185.

STATUTORY CONSTRUCTION. See POSTMASTERS' SALARIES.

In the absence of clear indication to the contrary, every statute must be construed to be prospective in its operation. *Trask v. Wanamaker*, 119.

STOCKS. See GAMING CONTRACTS.

STOLEN GOODS, RECEIVING. See CRIMINAL LAW, 24, 25.

STREETS AND HIGHWAYS. See NEGLIGENCE, 6; RAILROADS, 4, 5.

1. Where the District of Columbia authorizes excavations in a public street so as to leave the street in an unsafe condition for pedestrians, the District at once becomes chargeable with the duty of seeing that proper safeguards are provided to prevent accidents. Therefore in an action against the District for damages alleged to have been caused by negligence in guarding a street, an instruction which directs the jury to find for the defendant unless they believe that it had actual or constructive notice by

the lapse of time, of the insufficiency of such safeguards, should not be granted, following *McPherson v. D. C.*, 18 D. C., 564; and *D. C. v. Woodbury*, 136 U. S., 450. *Costello v. District of Columbia*, 508.

2. When, in an action against the District to recover damages resulting from an accident due to the defective condition of a gas box placed by a gas company in a public sidewalk, the gas company is brought into the suit by notice, and assists in the defence, it will be estopped from thereafter disputing any fact on which the judgment is founded. *Boswell v. District of Columbia*, 526.
3. Where the declaration in such a case avers that plaintiff was injured by stepping into a hole in the street or sidewalk, it is error for the trial court to instruct the jury that it was not necessary for plaintiff to step bodily into the hole, but that if she struck her toe against a projection above the sidewalk, that would be getting her foot within the hole, and the averment of the declaration was satisfied by that evidence. *Id.*
4. If a defect, harmless in itself, exists in a public sidewalk, long enough to be known to the municipal authorities, which defect only becomes dangerous in combination with snow and ice, of which the authorities had no notice at all, the municipality is not liable simply because it had notice of the pre-existing defect in the sidewalk. *Free v. District of Columbia*, 608.

SUBCONTRACTORS. See **MECHANICS' LIENS**.

TAX DEEDS. See **CLOUD ON TITLE**, 2.

TAXED ATTORNEY'S FEE. See **PLEADING AND PRACTICE**, 28.

TECHNICAL WORDS, MEANING OF. See **EVIDENCE**, 6.

TENANCY BY THE CURTESY. See **CURTESY**.

TENANTS IN COMMON. See **EJECTMENT**.

TENDER.

Where one person tenders to another the amount he conceives to be due, by check, and the latter does not object to the tender as not being in proper form, but returns the check on the ground that the amount thereof is too small, any objection as to the form of the tender is waived. *Dale v. Richards*, 312.

TERMS OF COURT; PROLONGATION OF. See **PLEADING AND PRACTICE**, 5.

THREATS. See **DURESS**, 1.

TICKETS. See **RAILROADS**, 1, 2, 3.

TITLE, CLOUD ON. See CLOUD ON TITLE.

TITLE, PROOF OF. See CLOUD ON TITLE.

TORT, VERDICTS AND JUDGMENTS IN. See INTEREST, 1, 2, 3.

TRANSITORY ACTIONS. See ACTIONS.

TRESPASSERS. See RAILROADS, 1.

TRIAL COURT, EXPRESSION OF OPINION BY. See CRIMINAL LAW, 18.

TRIAL, POSTPONEMENT OF. See CRIMINAL LAW, 2.

TRUSTEES. See CONTRACTS, 10.

TRUST ESTATES. See TRUSTS.

TRUSTS. See JUDGMENTS, ASSIGNMENT OF.

1. Where real estate is conveyed upon trust for the use of a husband until the youngest child should attain the age of 21 years, upon the happening of which event the estate is to be sold and the proceeds divided among the children, each child has a vested estate in remainder, with the same rights and powers as exist in any other case where a vested remainder is created, subject only to the limitations in the deed itself as to the power of alienation. *Phillips v. Ogle*, 199.
2. It would be competent for any one of the children in such a case, on becoming of age to sell his interest to a stranger, but the stranger would be bound by the limitations provided in the deed. *Id.*
3. In such a case, as soon as the youngest child should arrive at the age of 21 years, the estate in the grantee would be precisely like any other estate acquired by devise, inheritance or purchase, and the grantee would be entitled to a sale of his interest. *Id.*
4. J. D. bequeathed to his son W., certain stocks to hold in trust for F. for life "for his maintenance and support, to pay to him the interest accruing thereon, or so much as is needful for that and for the like purpose, to sell the whole or any part of the principal, as in his (W.'s) discretion he may think best, and at the death of F. to pay over the same, in equal shares, to the brothers and sister of F.;" *Held*, that the extent of F.'s interest in this bequest was to have the income applied to his support and maintenance, and such income could not be subjected by F.'s creditors to the payment of his debts due them, especially when it was not shown that such debts were not for necessities. *Fearson v. Dunlop*, 236.

UNDUE INFLUENCE. See WILLS, 1, 2.

UNLICENSED BAR. See POLICE REGULATIONS.

UNLICENSED ENGINEER.

The fact that the defendant employed an unlicensed engineer, would not constitute a ground of recovery against him in a civil suit for damages, by a party injured in consequence of a boiler explosion. *Birmingham v. Pettit*, 209.

USE AND OCCUPATION. See ADMINISTRATION, 1, 2.

USURY.

The defence of usury can only be made, either at law or in equity, by the party from whom the usury has been exacted, and cannot be set up in a collateral proceeding; citing with approval *Kendal v. Vanderlip*, 2 Mackey, 105. *Phillips v. Ogle*, 199.

VARIANCE. See STREETS AND SIDEWALKS, 3.

VERDICT. See CRIMINAL LAW, 15; PLEADING AND PRACTICE, 2, 15; WILLS, 2, 3.

VERDICTS, INTEREST ON. See INTEREST, 2, 3.

VESTED REMAINDERS. See REMAINDERS.

WAGERS. See GAMING CONTRACTS.

WAIVER. See PLEADING AND PRACTICE, 18; TENDER.

WEIGHT OF EVIDENCE, VERDICT AGAINST. See PLEADING AND PRACTICE, 2.

WILLS. See ADMINISTRATION, 2.

1. In order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence. *Estate of McLane*, 554.
2. When in the trial of issues sent to a special term from the Orphans' Court upon a caveat to a will, a motion is made after the caveators have offered their evidence and rested, to direct the jury to return a verdict in favor of the validity of a will, it becomes the duty of the court if, in its judgment, considering all the evidence that has been offered, no reasonable mind could properly come to the conclusion that the fact of undue influence or fraud has been proved, to sustain the motion and direct a verdict accordingly. *Id.*

3. There is no difference between the power of the court to direct a verdict in will cases where the issue is as to fraud or undue influence, and its similar power in other cases. *Id.*
4. If a testator by his will gives to one who would inherit from him were he to die intestate, a portion less than would be inherited by the same person in case of intestacy, because of resentment against that person, growing out of an actual controversy between the testator and the legatee, the will would in nowise be invalidated by that circumstance. *Id.*
5. When a testator some time prior to making his will, declared to his daughter his purpose to make a different disposition of his property from that actually made, and one more favorable to her, while that circumstance may be considered in connection with other evidence, it is never sufficient, unsupported, to cause a will to be set aside. *Id.*

WITNESSES. See CRIMINAL LAW, 19; ROCK CREEK PARK.

1. Any person who has knowledge of a fact important to a party litigant, may be obliged to appear and testify to that fact. *United States v. Cooper*, 491.
2. When a person is summoned to testify, not as to a fact, but to give the result of his scientific knowledge, he is obliged to do so where his reasonable fees, beyond the common witness fees, have been tendered him. *Id.*

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